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In the Supreme Court of the United States

October Term, 1966

No.

United States of America, Appellant

v.

First City National Bank of Houston, Southern National Bank of Houston, and William B. Camp, Acting Comptroller of the Currency

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

OPINION BELOW

The oral opinion of the district court (App. A, *infra*, pp. 19–20) is unreported.

JURISDICTION

The judgment of the district court dismissing the government's complaint (App. B, *infra*, pp. 21–22) was entered on December 7, 1966. The United States filed a notice of appeal to this Court on December 19, 1966. The jurisdiction of this Court rests on Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29. *United States v. Con-*

tinental Can Co., 378 U.S. 441; *United States* v. *duPont & Co.*, 353 U.S. 586.

QUESTION PRESENTED

Whether the Bank Merger Act of 1966 requires the government in an antitrust suit challenging a bank merger to establish not only that the merger may substantially lessen competition but also that its anticompetitive effects are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.[1]

STATUTES INVOLVED

The pertinent portions of the Clayton Act and of the Bank Merger Act of 1966 are printed in App. C, *infra*, pp. 23-24.

STATEMENT

The Bank Merger Act of 1966 (App. C, *infra*, pp. 23-24), amending 12 U.S.C. 1828(c), provides in relevant part that a federal banking agency "shall not approve [a proposed bank merger] whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served"; if the agency

[1] When the district court dismissed the complaint, it also dissolved the automatic stay of the effectiveness of the Comptroller's approval provided by the 1966 Bank Merger Act. If probable jurisdiction is noted, we reserve the right to argue that the district court erred in so doing.

approves the merger, "[a]ny action brought under the antitrust laws" to challenge it must be commenced within thirty days; in any such action "the court shall review de novo the issues presented" and "the standards applied by the court shall be identical with those that the banking agencies are directed to apply."

The Act became effective on February 21, 1966. On May 12, 1966, First City National Bank of Houston and Southern National Bank of Houston entered into an agreement to merge. After the agreement was approved by the stockholders of each bank on or about June 16, 1966, an application for approval of the proposed transaction was made to the Comptroller of the Currency as required by 12 U.S.C. 1828(c). The Comptroller approved the proposed merger on September 20, 1966, although the Department of Justice and the Board of Governors of the Federal Reserve System had, pursuant to 12 U.S.C. 1828(c)(4), submitted reports to the Comptroller on the competitive factors involved, indicating that the merger would have substantial effects.

On October 19, the Department of Justice filed a complaint in the district court challenging the proposed merger on the ground that it might substantially lessen competition in violation of Section 7 of the Clayton Act. The complaint alleged the following facts:

First City is the largest commercial bank in Harris County, Texas, and in the Houston metropolitan area.[1a] Together with its affiliates, it accounts for about 29.6 percent of all commercial bank deposits in

[1a] The Houston Metropolitan Area consists of Harris, Brazoria, Fort Bend, Liberty, and Montgomery Counties.

Harris County. Southern National is the sixth largest commercial bank in Harris County and in the Houston metropolitan area. Together with its two affiliates it accounts for approximately 2.8 percent of all commercial bank deposits in the county. Commercial banking in Harris County is already heavily concentrated. The five largest commercial banks account for approximately 66.3 percent of all the deposits and 65.2 percent of all the loans of the 85 commercial banks located in the county, and this heavy concentration is in large part a direct result of past consolidations among banks in the area. The merger of First City and Southern National would produce a bank having (with its affiliates) at least 32.4 percent of all commercial bank deposits in the county, and would increase concentration among the five largest commercial banks in the Houston area to the point where they and their affiliates would account for about 78 percent of total commercial bank deposits.

On October 26, 1966, the Comptroller intervened as a party in the action (as permitted by the Bank Merger Act of 1966) and the next day moved to dismiss the complaint for failure "to state facts sufficient to support a cause of action * * *." On November 1, 1966, the defendant banks filed a motion for dissolution of the statutory stay[1] on the ground that "the plaintiff has made no allegation in its complaint challenging the findings and the determinations of the Comptroller, that any anticompetitive effects re-

[1] Under the new act, commencement of the antitrust suit operates to stay consummation of the merger unless "the court shall otherwise specifically order."

sulting from the proposed merger are clearly outweighed in the public interest, as arbitrary, capricious or not supported by substantial evidence. Nor has the plaintiff alleged facts which constitute all the elements of a violation of the Bank Merger Act of 1966, 12 U.S.C. § 1828(c), which is the controlling statute in this case. Because plaintiff refuses to meet its statutory burdens there is no reasonable probability that it will prevail in the trial on the merits."

On November 10, 1966, the Comptroller issued an opinion stating why he had approved the merger. He concluded that the merger would have no adverse effect on competition and that, in any event, "any anti-competitive effects of this transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the Houston area community * * *." On December 1, 1966—the day before the motions to dismiss and to dissolve the statutory stay were to be argued before the district court—the successor Comptroller (who had taken office subsequent to approval of the merger) issued a supplemental opinion. It concluded that the question of convenience and needs need not be reached because, although competition would be lessened, there were no substantial anticompetitive effects; and that even assuming that there were such effects they were outweighed by the "manifold advantages accruing to the Houston area."

After a hearing on December 2, the district court orally announced its ruling from the bench (App. A, *infra*, pp. 19-20). It held that, under the Bank Merger Act of 1966, the government is required to

plead and prove not only that the merger is anticompetitive, but also that the competitive injury is not outweighed by the convenience and needs of the community to be served. Accordingly, the court granted the Comptroller's motion to dismiss for failure to state a cause of action, but stayed dismissal for 10 days (from December 9, 1966, to the effective date of its judgment) in order to give the government an opportunity to amend its complaint. At the same time it also granted the defendant banks' motion to dissolve the statutory stay, to become effective (if the government did not amend) on the date of dismissal. (App. A, *infra,* p. 20). The government declined to amend, and on December 19, 1966, the court dismissed the complaint and dissolved the statutory stay.[3]

THE QUESTION IS SUBSTANTIAL

In *United States* v. *Philadelphia National Bank,* 374 U.S. 321, this Court held that bank mergers were subject to Section 7 of the Clayton Act, which proscribes mergers whose effect may be substantially to lessen competition. The Bank Merger Act of 1966 modifies the holding of *Philadelphia Bank* by providing that a bank merger is unlawful, if it may substantially lessen competition, unless the competitive effect is "clearly outweighed in the public interest" by the merger's "probable effect in meeting the convenience and needs of the community to be served." This appeal—the first case involving the new stand-

[3] The district court at the same time refused the government's request to stay consummation of the merger pending this appeal. On December 21, we filed a stay application with this Court.

ard to come before the Court—presents the fundamental question whether the 1966 Act requires the government to establish, as an essential element of violation of the antitrust laws that the adverse effects of a challenged merger are not clearly outweighed by considerations of community convenience and need.

1. It is settled law "that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 44-45; *Javierre* v. *Central Altagracia*, 217 U.S. 502, 508. The corollary—equally well recognized—is "that where a party relies upon a statute containing a general clause followed by an exception or proviso in a subsequent substantive clause, such exception is a matter of defense and need not be negatived." *United States* v. *King & Howe*, 78 F. 2d 693 (C.A. 2). The statutory syntax alone makes clear that the "convenience and needs" justification is an exception to the Act's general disapproval of anti-competitive mergers and must therefore be established by the defendant banks. The history of the Act provides clear confirmation that this was the congressional design.

This Court's decision, in *Philadelphia Bank*, that Section 7 encompassed bank mergers, brought into sharp focus certain problems in the existing regulatory scheme applicable to those mergers. In passing on bank merger applications under the Bank Merger Act of 1960, the banking agencies were only required to consider competition as one of a number of equally weighted factors. On the other hand, after *Phila-*

delphia Bank, it was clear that the courts were required to apply the standards of Section 7 of the Clayton Act—which makes no specific provision for such special features as commercial banking may involve.

Congressional dissatisfaction with these conflicting standards led to the introduction of bills and to the hearings and debates in Congress which resulted in the passage of the 1966 amendments to the Bank Merger Act. Experience with the application by the banking agencies of the 1960 Bank Merger Act was cited as demonstrating that it had not been adequate to check a wave of anti-competitive bank mergers. *E.g.*, 112 Cong. Rec. (daily ed.) 2337. On the other hand, some members of Congress feared that, despite this Court's suggestion that a somewhat expanded "failing-company" doctrine might be applicable in bank merger cases under Section 7 (see 374 U.S. at 372, n. 46), that statute might not permit the courts to consider some distinctive features of the banking industry that might be relevant to whether a merger should be approved—most notably the unique public interest in preserving solvent and viable banks. H. Rep. No. 1221, 89th Cong., 2d Sess., p. 3.

Congress resolved these problems in the 1966 Act by establishing a single standard, for both agency and court, under which a merger that might substantially lessen competition could not be approved unless "the anticompetitive effects of the proposed transaction are *clearly outweighed* in the public interest by the probable effect of the transaction in meeting the con-

venience and needs of the community to be served." [Emphasis added.]

The thrust of the new Act is thus to prohibit anticompetitive mergers, but to allow an *exception* to the basic prohibitory policy so as to accommodate the competing concerns voiced in the deliberations. The court below has held, however, that the district court cannot apply antitrust standards to enjoin a bank merger unless the government proves facts enabling the court to find that the merger's anti-competitive consequences are not clearly outweighed by the convenience and needs of the community. The practical effect of requiring the government to prove this negative proposition as an indispensable element of its antitrust case is to overemphasize the convenience and needs factor, by making the government's task in establishing the illegality of a challenged bank merger significantly more difficult than Congress intended.

Nor need we rest with an inference from the statutory design. There is express indication that the framers specifically intended the banks to bear the burden of showing offsetting factors of community convenience and needs. Thus the House Report[4] states:

> * * * the bill acknowledges that the general principle of the antitrust laws—that substan-

[4] The bill which became the 1966 Act, H.R. 12173, 89th Cong., was drafted in the House Banking and Currency Committee and introduced by its Chairman, Representative Patman, H. Rep. 1221, 89th Cong., 2d Sess. It was passed by the House and substituted for a related bill, S. 1698, which the Senate had passed in the previous session. 112 Cong. Rec. (daily ed.) 2333–2360. The Senate accepted the House substitute without a conference. 112 Cong. Rec. (daily ed.) 2537–2551.

> tially anticompetitive mergers are prohibited—applies to banks, but permits an exception in cases where it is clearly shown that a given merger is so beneficial to the convenience and needs of the community to be served * * * that it would be in the public interest to permit it. [H. Rep. No. 1221, *supra*, pp. 3–4.][5]

[5] Similar statements were made by the Congressman primarily responsible for the bill. Congressman Patman, Chairman of the House Banking and Currency Committee and sponsor of the bill, stated:

> The single standard that the bill establishes is found in paragraph 5(b). This standard gives primary emphasis to the competitive factors in bank merger cases. It allows the competitive factor to be overridden only in those cases where it is established by the proponents of the merger that the convenience and needs of the community to be served by the merger clearly outweighs in the public interest the resulting diminution of competition. *It should be clearly noted that the burden of establishing such "convenience and needs" is on the banks seeking to merge,* and when we say clearly outweighed we mean outweighed by the preponderance of the evidence. [112 Cong. Rec. (daily ed.) 2333–2334; emphasis added.]

Congressman Reuss, one of the principal framers of the 1966 Bank Merger Act, pointed out:

> The way in which this factor of convenience and needs of the community to be served is juxtaposed against the antitrust competitive standard is important. It means that an anticompetitive merger should be approved only in a case where *the proponents of a bank merger can establish that the advantage of the merger in terms of the convenience and needs of the community clearly outweighs the anticompetitive effects of the merger. This intentionally creates a heavy burden for the proponents of a merger, and I anticipate very few cases in which this burden could be sustained.* [112 Cong. Rec. (daily ed.) 2337; emphasis added.]

In his dissenting views to the House Report, Congressman Todd observed:

> A leading proponent [of the bill], when asked what this bill

2. Defendants and the Comptroller base their argument that the government should bear the burden of negating the convenience and needs defense on what we believe is a fundamental misconception of the scheme of the Bank Merger Act of 1966. From the premise that the function of the district court in the antitrust action is simply to review the approval given the merger by the banking agency to determine whether the agency's action is supported by substantial evidence, they argue that the government must overcome the agency's finding. But, although such a solution was considered by Congress as a means of resolving the problems thought to have been created by the *Philadelphia Bank decision*,[a] it was rejected. The Act expressly states that in an action under the antitrust laws review by the district court of the issues shall be "de novo". This language was inserted at the urging of the Attorney General, who argued to Congress that the court in an antitrust case should *not* function as a court reviewing an administrative agency's findings, but, rather, should freshly reexamine all of the issues involved, in determining

was intended to do, stated that the language of section 5 was changed from earlier proposals for the purpose of making it clear that the competitive factors are in a sense preeminent, and that as far as section 1 of the Sherman Act and section 7 of the Clayton Act are concerned, *the burden of proof shall be upon the merging institutions to show that any substantial lessening of competition caused by the merger is clearly outweighed in the public interest.* [H. Rep., *supra*, pp. 37–38; emphasis added.]

[a] See H.R. 11011, introduced by Congressman Ashley on September 13, 1965.

whether the bank merger should be allowed.[8] The Attorney General's suggestion was adopted. In commenting upon the de novo feature of the Act, Repre-

[8] The Attorney General wrote to the House of Representatives:

I am opposed to particular procedures set forth in H.R. 11011. [A predecessor of the bill that became the 1966 Bank Merger Act.] The bill provides for review in a court of appeals on the basis of a "record" upon which the order complained of was entered, and further provides that on review the findings of the agency as to the facts, if supported by substantial evidence, shall be conclusive. This type of review is normally used for determinations by such agencies as the Federal Power Commission and the Federal Trade Commission who, pursuant to the Administrative Procedure Act, have held full public adversary hearings on a public record, with full opportunities to all parties to develop evidence as to rebut evidence produced by the others. No such procedures for the full development of a record are provided for by the Bank Merger Act or by any current proposal, and indeed there are important considerations that make the more summary handling of merger applications particularly appropriate. Since the vast majority of applications raise no serious problems of an antitrust nature, there would seem to be little point in subjecting all merger applications before the regulatory authorities to all of the requirements of the Administrative Procedure Act in order to lay the groundwork for court review in those few instances where serious questions of competition are presented.

Consequently, while I am sympathetic to efforts to clarify through legislation the application of antitrust law to banks, I believe that the current practice, whereby the Department of Justice institutes proceedings in Federal district courts against mergers which it believes to be unlawful, should be allowed to continue; so that there could be a trial de novo of all issues in any such suit. [Letter to Wright Patman, Chairman, Banking and Currency Committee, U.S. House of Representatives, from Nicholas deB. Katzenbach, Attorney General, dated September 24, 1965, H. Rep., *supra*, pp. 9–10.]

sentative Patman stated (112 Cong. Rec. (daily ed.) 2335):

> The intent here is to have the court completely and on its own make a determination as to whether the challenged bank merger should be approved under the standard set forth in paragraph 5(B) of the bill. The court is not to give any special weight to the determination of the bank supervisory agency on this issue, but is to independently make a judgment as to whether the merger should be approved on the basis of the evidence presented to the court.

Representative Reuss, one of the bill's principal authors, stated:

> I would also like to emphasize that this bill makes the courts the complete and final arbiter of whether a bank merger should be approved under the standard established by this legislation. This is accomplished by providing for de novo review in a Federal court of any bank merger approved by a bank supervisory agency and challenged in the courts by the Justice Department. In such a case, the court shall determine independently of the decision of the supervisory agency, on the evidence presented to it, whether the proposed merger violates the standard established in paragraph (5) of this bill. [112 Cong. Rec. (daily ed.) 2338; see, also, remarks of Representative Multer (112 Cong. Rec. 2336-2337).]

There is, then, no basis for analogizing the present case to a case involving court review of an administrative finding.[7]

[7] The independent role of the antitrust court is demonstrated by the Bank Holding Company Act of 1966, 80 Stat. 236, passed

(3) The wisdom of applying the normal rule of statutory construction—and so of requiring the defendant banks to establish a "convenience and needs" justification—is particularly evident here. First, it is far easier for defendants to bear the burden of proof on this issue than it is for the government to do so. See *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, 74. Evidence showing whether or not the merger will have substantial beneficial effects is more likely to be in the possession of the defendants. Certainly the banks are more intimately familiar than the government with their own "financial and managerial resources and future prospects"—the factors specifically mentioned in the Act (App. C, *infra*, p. 24)—and evidence concerning these matters is essential to determine whether the merger is justifiable because necessary to prevent a bank from floundering and thereby endangering the unique community interest in preserving solvent and viable banks (see House Report, p. 3). There is a close analogy here to non-banking merger cases, where—no one disputes—the

by the same session of Congress. This statute extended to bank holding companies provisions almost identical with the Bank Merger Act, including an antitrust action in the district court under the same standards the agency applies. It also continued in effect pre-existing provisions for judicial review of the banking agency's decision in the courts of appeals (80 Stat. 236, 240). The district court and the appellate proceedings are not parallel judicial reviews however. As in the Bank Merger Act, the district court is "to review *de novo* the issues presented" (80 Stat. 240); in contrast the courts of appeals are limited to traditional substantial evidence review of agency action (12 U.S.C. 1848). Thus Congress has clearly distinguished the two types of proceeding in a contemporaneous statute *in Pari materia* with the Bank Merger Act.

burden of pleading and proving the "failing company" defense is on the defendants. In this case, since defendants and the Comptroller urge very broad and general benefits to the community flowing from the creation of a larger bank with larger resources, the same considerations of convenience and capability of proof apply *a fortiori*.

Furthermore, to require the government to show that the "convenience and needs" justification does not exist is to demand proof of a negative. Even if the government refutes some alleged benefits, how is it practicably to establish that there are *no* others, the existence of which it did not suspect? To prove that the merger is not, in fact, necessary to achieve the benefits that are claimed for it also involves speculation and conjecture. There is thus sound practical reason for following the normal rule of evidence that the party asserting an affirmative bears the burden of proof. Cf. 9 Wigmore, *Evidence* (3d ed), § 2486. Also, to require the government to bear the burden of proof would conduce to disorderly and wasteful procedure. The government might have to go into the "convenience and needs" issue twice, first building a hypothetical case based upon the benefits that it thought defendants were likely to claim, and then one based upon the benefits that defendants actually claimed.[8]

[8] Consistent with their position taken in their motion to dissolve the stay, defendants may urge that these problems cannot arise: they view this proceeding as one to review the determinations made by the Comptroller, and hence they may argue that the only issues of convenience and needs open in the district court

In these ways the ruling below seriously impairs effective enforcement of the antitrust laws against bank mergers under the new standard.

4. The question presented is plainly substantial. It is of great importance to the administration of the antitrust laws that it be resolved promptly. Antitrust proceedings involving mergers in five other major banking markets are pending in the district courts at present,[8] and several courts have already held that the government must bear the burden of proof on the convenience and needs issue, reasoning that on this issue they function only as reviewing courts to which the government must show that the banking agencies' finding are not supported by substantial evidence. *United States* v. *Provident National Bank, et al.*, 1966 Trade Reg. Rep., ¶ 71,940; *United States* v. *Third National Bank of Nashville, et*

involve those findings upon which he relied. This argument reveals the full extent of the disagreement between the parties and the basic nature of the issue. We believe for the reasons stated above that Congress in the 1966 Bank Merger Act did not intend the district court, in "an action brought under the antitrust laws" in which the statutory issues are to be reviewed de novo, to conduct merely a proceeding to review the Comptroller's decision. (In a de novo proceeding the banks would not, of course, be limited to urging only those "convenience and needs" factors relied on by the agency.)

[8] *United States* v. *Mercantile Trust Company, et al.*, E.D. Mo., No. 65 C. 241(1) (St. Louis); *United States* v. *Provident National Bank, et al.*, E.D. Pa., No. 40032 (Philadelphia); *United States* v. *Third National Bank of Nashville, et al.*, M.D. Tenn., No. 3849 (Nashville); *United States* v. *Crocker-Anglo National Bank, et al.*, N.D. Cal., No. 41808 (San Francisco); *United States* v. *First National Bank of Hawaii, et al.*, D. Hawaii, No. 2540 (Hawaii).

al., 1966 Trade Reg. Rep., ¶71,934; *United States v. Crocker-Anglo National Bank, et al.*, 1966 Trade Reg. Rep., ¶71,898. The court below appears to have relied on these cases in its decision, and similar rulings may be anticipated.

Clarification of the elements that the government must plead and prove in order to establish a *prima facie* antitrust case, in light of the Bank Merger Act of 1966, is necessary not only to provide guidance for the many cases already in litigation but also to shape the government's program of future litigation. In pending cases, an authoritative decision settling the burden of proof issue will avoid the waste of valuable time and resources in prolonged litigation under possibly erroneous standards. As for future cases, we point out that the wave of bank mergers that began 16 years ago and has not abated. Our records show that more than 120 mergers were approved by the banking agencies in this year alone. The Department of Justice reported adverse competitive consequences to the banking agencies in a number of these and is studying the possibility of suit. Whether and when to sue depends significantly on how much it must prove.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

DONALD F. TURNER,
Assistant Attorney General.

ROBERT A. HAMMOND, III,
HOWARD E. SHAPIRO,
Attorneys.

DECEMBER 1966.

APPENDIX A

[Caption omitted]

Extract From Transcript of Proceedings, December 2, 1966

The Court. I am of the view in the light of these few authorities which we have at this time that the act of 1966 made some rather substantial changes in the law. I understand the case is to hold the burden to be on the plaintiff to allege and prove an anti-competitive result of the merger, and further that that is not outweighed by the convenience and needs aspect of the matter.

I think the Department of Justice has continued for reasons of its own to adopt a contrary interpretation which, of course, may or may not be accurate, these cases not having yet reached the appelate [*sic*] level, but I consider them as authoritative, at least at this time.

I think that the petition fails to state a cause of action in that it alleges only the first step and not the second step which is necessary for the plaintiff to support.

I have no desire to dispose of a case of this kind on a question of pleading. I think that was the view that influenced the other Judges that had the same matter before them when they spoke of notice pleading. That, however, isn't a case—well, this present case is one where all parties have acted with their eyes open. Both the plaintiff and the defendants have

known precisely what they were doing. If they do not allege a case in their present petition, then Justice has done that because it desired to do so.

I will sustain the motion to dismiss for failing to state a cause of action. I will give the government if it wishes an opportunity to amend and to allege a cause of action as I understand is required by the authorities to date.

Let us say within ten days?

* * * * *

The Court. I had not quite concluded, but I would dissolve the injunction in light of this action, provided that you may amend within ten days if you wish.

APPENDIX B

United States District Court for the Southern District of Texas, Houston Division

Civil Action No. 66-H-695. Filed December 7, 1966

UNITED STATES OF AMERICA, PLAINTIFF

v.

FIRST CITY NATIONAL BANK OF HOUSTON AND SOUTHERN NATIONAL BANK OF HOUSTON, DEFENDANTS, AND JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, INTERVENOR.

Judgment

The above cause came on to be heard on the 2nd day of December, 1966, on the Motion For Dissolution Of Statutory Stay of defendants, First City National Bank of Houston and Southern National Bank of Houston, and the Motion To Dismiss of Intervenor, James J. Saxon, Comptroller of the Currency, and came the plaintiff, defendants and intervenor by and through their respective attorneys of record and announced ready for the hearing on said Motions; thereupon, the Court, after hearing the pleadings, evidence and argument of counsel, is of the opinion and so finds that the Motion To Dismiss of the Intervenor should be granted with leave of the plaintiff to amend its complaint within ten (10) days and that as a result thereof, Defendants' Motion For Dissolution Of Statutory Stay should be granted.

It is, therefore, ORDERED that the Motion to Dismiss of Intervenor, James J. Saxon, Comptroller of the Currency be granted and this cause will be dismissed unless plaintiff shall amend his complaint within ten (10) days from the effective date hereof.

It is further ORDERED that the Motion for Dissolution of Statutory Stay of First City National Bank of Houston and Southern National Bank of Houston will be granted, effective on dismissal of the action.

It is further ORDERED that this judgment is and shall become effective at 12:00 o'clock Noon on December 9, 1966.

ENTERED on this 7th day of December, 1966.

(S) BEN C. CONNALLY,
United States District Judge.

APPENDIX C

STATUTES INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Section 18(c) of the Bank Merger Act, as amended, 80 Stat. 7, 12 U.S.C. 1828(c) (1966 Supp.), provides in perainent part:

> (5) The responsible agency shall not approve—
>
> (A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or
>
> (B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the

proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

* * * *

(7) (A) Any action brought under the antitrust laws arising out of a merger transaction shall be commenced prior to the earliest time under paragraph (6) at which a merger transaction approved under paragraph (5) might be consummated. The commencement of such an action shall stay the effectiveness of the agency's approval unless the court shall otherwise specifically order. In any such action, the court shall review de novo the issues presented.

(7) (B) In any judicial proceeding attacking a merger transaction approved under paragraph (5) on the ground that the merger transaction alone and of itself constituted a violation of any antitrust laws other than section 2 of [Title 15], the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5).

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. ____

UNITED STATES OF AMERICA, APPELLANT

v.

PROVIDENT NATIONAL BANK, CENTRAL PENN NATIONAL BANK OF PHILADELPHIA, AND WILLIAM B. CAMP, ACTING COMPTROLLER OF THE CURRENCY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinions of the district court (App. A, *infra*, pp. 9-25) are not yet reported.

JURISDICTION

The judgment of the district court dismissing the government's complaint (App. A, *infra*, p. 14) was entered on December 29, 1966. The United States filed a notice of appeal to this Court on January 10, 1967. The jurisdiction of this Court rests on Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29. *United*

243-072—67——1

States v. *Continental Can Co.*, 378 U.S. 441; *United States* v. *duPont & Co.*, 353 U.S. 586.

QUESTION PRESENTED

Whether the Bank Merger Act of 1966 requires the government in an antitrust suit challenging a bank merger to establish not only that the merger may substantially lessen competition but also that its anticompetitive effects are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.[1]

STATUTES INVOLVED

The pertinent portions of the Clayton Act and of the Bank Merger Act of 1966 are printed in App. B, *infra*, pp. 26–27.

STATEMENT

The Bank Merger Act of 1966 (App. B, *infra*, p. 26), amending 12 U.S.C. 1828(c), provides in relevant part that a federal banking agency "shall not approve [a proposed bank merger] whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the

[1] When the district court dismissed the complaint, it also dissolved the automatic stay of the effectiveness of the Comptroller's approval provided by the 1966 Bank Merger Act. If probable jurisdiction is noted, we reserve the right to argue that the district court erred in so doing.

community to be served"; if the agency approves the merger, "[a]ny action brought under the antitrust laws" to challenge it must be commenced within thirty days; in any such action "the court shall review de novo the issues presented" and "the standards applied by the court shall be identical with those that the banking agencies are directed to apply." The Act became effective on February 21, 1966.

On or about November 10, 1965, the boards of directors of the Provident National Bank and the Central Penn National Bank of Philadelphia approved an agreement to merge the two banks. On December 6, 1965, the banks applied to the Comptroller of the Currency for approval of the proposed transaction, as required by 12 U.S.C. 1828(c). Pursuant to that statute, the Board of Governors of the Federal Reserve System and the Department of Justice, on January 7, 1966, submitted reports to the Comptroller on the competitive factors involved in the proposed merger. (App. A, *infra*, p. 18.) The Board of Governors concluded that "the overall effect of the proposed merger on competition would be significantly adverse." The Attorney General concluded: "There are strong reasons * * * for believing that the proposed merger would have an important adverse effect on competition within the Philadelphia banking market * * * the anticompetitive effects of this merger are important and considerable and there are likely to be no redeeming features." Despite these reports, the Comptroller of the Currency approved the merger on March 4, 1966, under the standards of the recently approved Bank Merger Act of 1966, and, on March 31, 1966,

filed an opinion giving his reasons for approval. The opinion states (App. C, *infra*, p. 31)

> that this merger, rather than having an overall adverse effect on competition, will have a favorable effect. Further, the increased ability of the resulting bank to serve the convenience and needs of the Philadelphia area by increased efficiency, by a greater lending capacity, through more adequate banking quarters, and by a generally improved quality of banking service makes this merger desirable. * * *

The opinion concludes that the merger "clearly conforms to the statutory criteria and is in the public interest."

On April 1, 1966, the Department of Justice filed a complaint (App. D, *infra*, pp. —) in the district court charging that the proposed merger might substantially lessen competition, in violation of Section 7 of the Clayton Act. The complaint alleged the following facts: Provident is the fifth largest commercial bank in the four-county Philadelphia area,[3] accounting for 9 percent of all commercial bank deposits in the area. Central Penn is the sixth largest, accounting for approximately 5 percent. Commercial banking in this area is already heavily concentrated—the five largest banks account for some 71 percent of all commercial deposits and 74 percent of all loans of the 37 banks located in the area—and this heavy concentration is in large part a direct result of past consolidations. The merger of Provident and Central Penn would increase concentration among the five largest commercial banks

[3] This four-county area consists of Philadelphia, Bucks, Delaware and Montgomery Counties, Pennsylvania.

in the four counties to the point where they would account for about 76 percent of total commercial deposits.

On August 11, 1966, the Comptroller—who had intervened as a party in the antitrust action as permitted by the Bank Merger Act of 1966—moved to dismiss the complaint; and on August 22 the defendant banks followed suit. Their arguments were directed to showing that the government was unwilling to shoulder the burden of proving that the merger was not justified by its probable effect in meeting the convenience and needs of the community to be served. The district court initially denied the motions to dismiss (App. A, *infra*, pp. 17–25), on the ground that the action was "now only at the notice pleading stage," and that the complaint was adequate to place the parties on notice that the government believed that the merger was illegal under the Clayton Act as modified by the Bank Merger Act of 1966. However, on November 4, the district court ruled that in order to prove that the merger of defendant banks was illegal the government would be required to prove both that the merger would have substantial anticompetitive effects and "that these anticompetitive effects are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." (App. A, *infra*, pp. 14–17.) The court indicated that great weight would be accorded the findings of the Comptroller: if it "appears that the decision of the Comptroller [approving the merger] is dependent on an exercise of discretion, the Court will bow to that

discretion. However, if from the fact findings it appears that the Comptroller abused, exceeded or arbitrarily applied his discretion, the Court will set it aside." (App. A, *infra*, p. 6.)

On December 2, 1966, the defendant banks moved for entry of a final judgment dismissing the complaint on the ground that the government had indicated in various filings that it was unwilling to assume the burden of proof on the "convenience and needs" issue. On December 6, the Comptroller made a similar motion. On December 29, the district court granted the motions, holding that the government must bear the burden of proof on the "convenience and needs" issue. The court indicated that one reason for so holding was that, in the court's opinion, the government was in error in believing that the court "must make an independent decision as to whether the public interest in the merger outweighs any anticompetitive effects." (App. A, *infra*, p. 12.) At the same time that the court dismissed the complaint, it also lifted the statutory stay of the merger, but provided the merger could not be consummated before January 18, 1967.[3]

THE QUESTION IS SUBSTANTIAL

This appeal presents the identical question as *United States* v. *First City National Bank of Houston, et al.*, No. 914, this Term—whether the new Bank Merger Act requires the government to establish, as an essential element of violation of the antitrust laws, that the adverse effects of a challenged bank merger

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[3] On January 9, 1967, the government filed an application with this Court for a stay of consummation of the merger pending disposition of this appeal.

are not clearly outweighed by considerations of community convenience and need. The government's reasons for believing that this question is substantial are explained in the jurisdictional statement in No. 914. We incorporate that discussion here by reference.

We emphasize there that the question presented, while nominally a narrow one of burden of proof, in fact involves the fundamental issue whether an anti-trust action attacking a bank merger is basically a proceeding in review of the action of the approving banking agency. In this case the district court expressly held that the court is not to make an independent evaluation of the issues, but is merely to determine whether the agency's determination is an arbitrary abuse of discretion; and that the great weight thus to be accorded the agency's findings constitutes persuasive support for the view that the government, not the defendants, bears the burden of proof with respect to the convenience and needs defense. (Statement, *supra*, p. 6.) This ruling confirms our view that fundamental issues in the construction of the new Bank Merger Act are inescapably presented by these appeals; and that plenary consideration is therefore warranted.

CONCLUSION

Probable jurisdiction should be noted.[4]

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

DONALD F. TURNER,
Assistant Attorney General.

JANUARY 1967.

[4] As noted in the application for stay filed with this Court in this case (see p. 6, n. 3, *supra*), we are prepared, if the Court wishes, to accelerate the briefing of this appeal so as to permit it to be argued at the same time as the appeal in No. 914.

APPENDIX A

I

Opinion and Order of December 29, 1966

[CAPTION OMITTED]

Clary, *Chief Judge:*

This is an action by the United States Government, filed by the Department of Justice (hereinafter referred to as Justice), to enjoin a merger of the Provident National Bank and Central-Penn National Bank of Philadelphia. The complaint was filed on April 1, 1966, the banks answered on April 5, 1966, and the following day the Comptroller of the Currency intervened as a party. Motions to dismiss were filed by the defendants and intervenor, and on October 13, 1966, an Opinion was filed (Docket Paper #34), together with an Order denying the motions. The basis of the Opinion was that, although this action was solely within the ambit of the Bank Merger Act of 1966 (hereinafter referred to as BMA–66), under principles of notice pleading, it was not necessary to specifically plead the BMA–66. Thus, the complaint of Justice filed under Section 7 of the Clayton Act was held valid.

However, in *United States* v. *Mercantile Trust Company National Association, et al.*, Civil Action No. 65C 241 (1), (Eastern District of Missouri, Eastern Division, December 19, 1966), Chief Judge Roy

Harper held, on pleadings which are completely similar to the instant case, the following:

> The complaint does not allege a monopoly, but alleges that the merger may substantially lessen competition and tend to create a monopoly in violation of Section 7 of the Clayton Act. Thus, the complaint only states part of a claim against the defendants required under BMA–66, in that it does not allege a monopoly, nor that the anticompetitive effects of the merger are not outweighed in the public interest by the probable effects of the transaction in meeting the convenience and needs of the community. The plaintiff's complaint does not meet the absolute basic minimum standards of notice pleading, in that it has not alleged a violation of BMA–66, the act that applies to all bank mergers, nor has it alleged sufficient facts to support such violation.

Judge Harper dismissed the case with privilege to amend within twenty days. In the instant case, with the pleadings complete, the Government has taken an adamant position as hereinafter discussed.

After the Opinion of October 13, 1966, denying the motions to dismiss was filed, further pre-trial proceedings were had, and the Court ordered each side to submit an Identification of Witnesses, Summary of Evidence, and Statement of Position. This the Department of Justice did on November 30, 1966 (Docket Paper #44). In this document Justice stated unequivocally that it intended to prove a violation of Section 7 of the Clayton Act only, without any reference to BMA–66, contending that this was an action under Section 7, and that it was entitled to a determination of the issues on that sole basis. The ruling of this Court was exactly to the contrary.

The defendant banks, upon being served with plaintiff's Identification of Witnesses, Summary of Evi-

dence, and Statement of Position on December 2, 1966, filed a Motion for Final Judgment (Docket Paper #45) with exhibits in support thereof. The Comptroller intervenor filed a Motion for Final Judgment (Docket Paper #46) on December 6, 1966. Thereafter, on December 12, 1966, a conference was held in chambers at which the subject was discussed in depth, a transcript of which hearing is part of the record of this case, and the Court took the matter under consideration. It is these two Motions for Final Judgment which are presently before the Court for disposition.

To date no one has denied the fact that Provident, in the four-county market area designated by the Opinion of the Supreme Court in *United States v. Philadelphia National Bank,* 374 U.S. 371 (1963),[1] controls a definite percentage of the total assets, of the total loans, of the total IPC deposits, and of the total banking offices. Likewise, no one has denied that Central-Penn controls a definite percentage of the total assets, of the total loans, of total IPC deposits, and of the total banking offices doing business in the four-county area. In other words, no one has denied that there will be a concentration of the total of these two percentages of the total assets, of the total loans, of total IPC deposits, and of the total banking offices in the four-county area in the new bank if merged as permitted by the Comptroller of the Currency. Justice says in its Statement of Position that it will prove this and no more. Paying lip service to the ruling of this Court of October 13, 1966, it contends that BMA-66 may have some relevancy, but that this

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[1] Despite the finding of the District Court that the two banks involved in that case were realistically in competition with banks of other states, the Supreme Court limited its consideration to the case to a four-county area.

Court is without power to consider in any way the finding of the Comptroller that this merger meets the specifications and qualifications of BMA-66.

This Court has thus been asked by the Government to rule that the banks and Comptroller must present evidence with respect to the merger de novo as if it were being done for the first time; come to its own conclusions independently of the Comptroller and "free of presumptions traceable to anyone"[3] in determining the validity of this merger. The expertise, know-how, direct findings, and conclusions of the Comptroller, the Government contends, are of absolutely no probative value in this Court. In other words, the Government contends that this Court must make an independent decision as to whether the public interest in the merger outweighs any anticompetitive effects. This contention, if considered again, would raise the constitutional question of separation of powers.

> If the function performed by an agency is "administrative" or "legislative" and if a federal court is required to do all over again what the agency has done, the system of review violates Article III of the Constitution. (Davis Administrative Law Treatise, 1958, Vol. 4, p. 180, §29.10.)

See also the Opinion of Judge Pope in *United States v. Crocker Anglo National Bank, et al.,* Civil Action No. 41,808, (District of California, Southern Division, October 6, 1966).

The Court, therefore, finds that since Justice has definitely refused to try its case under BMA-66, the banks should not be subjected to the expense and inconvenience of a trial when Justice refuses to prove other than admitted facts to establish its case. Its position has been taken deliberately and directly in

[3] Plaintiff's Pre-trial Brief (Docket Paper #16), page 28.

opposition to the ruling of the Court of October 18, 1966, and is consistent with the position of the Government on a nationwide basis, even though the Courts have been unanimous in refusing to accept its contention. *United States* v. *Mercantile Trust Company National Association, et al.*, No. 65C 241 (1), (District of Missouri, Eastern Division, December 19, 1966); *United States* v. *First City National Bank of Houston, et al.*, Civil Action No. 66–H–695, (Southern District of Texas, Houston Division, December 2, 1966); *United States* v. *First National Bank of Hawaii, et al.*, Civil Action No. 2540, (District of Hawaii, October 31, 1966); *United States* v. *Crocker Anglo National Bank, et al.*, Civil Action No. 41,808, *supra*.

At the hearing on December 12, 1966, Justice also took the position that if the Court should grant the motion of the defendant banks and the intervenor, the Court should, in the exercise of its discretion, continue the statutory stay automatically entered when this suit was filed, taking the position that it was the sole purpose of Congress to halt all mergers after suit was filed until there has been a final determination on the merits. In this instance, it is the Department of Justice alone which has refused to proceed with trial on the merits of the case under BMA–66. I can read nowhere in the legislative history that it was the intention of the Congress of the United States to hold up mergers indefinitely pending determination of a Department of Justice theory. It appears throughout the legislative history that the Congress was concerned with the problems of divestiture as well as the tremendous expense to the applicant banks when mergers were unduly delayed, and that stay should be granted only when the Government, through the Department of Justice, in good faith proceeded promptly to a trial on the merits. This Justice refuses to do by its intransigent posi-

tion of the applicability of Section 7 of the Clayton Act only. It is, therefore, the decision of this Court that it will not stay the merger, except for a relatively short time to permit Justice to take such further action as it sees fit. A time lag, even of the statutory time for appeal, at the present time, might destroy the efficacy of the merger because of mounting expense.

The Court, therefore, enters the following

ORDER

And now, to wit, this 29th day of December, 1966, upon consideration of defendant banks' Motion for Final Judgment (Docket Paper #45), Motion of Intervenor for Final Judgment (Docket Paper # 46), the entire record of the case, including briefs, hearings, and arguments, it is Ordered, Adjudged and Decreed:

1. That the complaint in this case be and it is hereby Dismissed with prejudice;

2. That the statutory stay of the merger is Lifted and the banks may merge at a time to be determined by them, but not earlier than January 18, 1967.

By the Court:

Thomas J. Clary,
Chief Judge.

II

Oral Decision, November 4

Before Hon. Thomas J. Clary, Chief Judge.

The first question to be resolved is how much weight is to be given to the findings of the Comptroller. In the recent case of *U.S.* v. *Crocker Anglo National Bank* the Court, in answer to this question, declared its intention to apply the substantial evi-

dence test to the Comptroller's public interest findings, calling the "convenience and needs" test of BMA-66, Section 5(B) non-judicial in character. Yet, *Crocker* would also apply the substantial evidence test, with less vigor, to the Comptroller's findings on competition.

Crocker, however, is distinguishable from the case at bar, and it is distinguishable on one fact. In *Crocker* the findings of the Comptroller were based on a public, evidentiary hearing which produced 1,605 pages of testimony and exhibits. There was no such hearing in the instant proceeding. Therefore, although the *Crocker* holding rules the instant case as a Court review of an agency decision, the question of scope of review comes under the rule of *First National Bank of Smithfield, North Carolina* v. *Saxon*, 352 F. 2d 267 (4 Cir. 1965).

Smithfield involved a branch bank approval under 12 U.S.C. Section 36 in which the Comptroller approved a new branch without a hearing. The Court first held that a hearing was not required because 12 U.S.C. Section 36 made no provision for one. A hearing is only required when expressly directed by the empowering statute. Then, after this determination, the Court declared that weight is only to be given to the Comptroller's decision if after a Court hearing in law and in fact it is found that his decision rested on an exercise of discretion. This is because the Court will not substitute its discretion for the Comptroller's.

This Court finds *Smithfield* to be analogous to the instant case. The BMA-66, like 12 U.S.C. Section 36, has no requirement for a hearing before the Comptroller, thus allowing the Comptroller to act at his discretion. However, when there is no hearing, it cannot be contended that the findings of the Comp-

troller should be given given the weight of hearing based findings.

The basis for this conclusion is best seen in the following quote from *Smithfield*:

> We have said the Comptroller did not act arbitrarily in not allowing a hearing. However, a necessary consequence of his unilateral procedure is that the facts on which the Comptroller presumably acted should not be given the preferred position accorded by the substantial-evidence rule. The rule would declare them indisputable if some reasonable basis for them may be found in the evidence. Applied here, the plaintiff would be bound by evidence offered in a proceeding in which it was not heard. Hence, there is no place in the review for an opening-presumption of correctness of any fact which it may appear to the Court was adopted by the Comptroller for his decision.

The substantial evidence rule, therefore, may be invoked only when a proper foundation is laid for it as was done in *Crocker*.

Therefore, the Court will hear all evidence in law and in fact, and if after it has made its findings, it then appears that the decision of the Comptroller is dependent on an exercise of discretion, the Court will bow to that discretion. However, if from the fact findings, it appears that the Comptroller abused, exceeded, or arbitrarily applied his discretion, the Court will set it aside.

The other question requiring answer is how is the burden of proof to be allocated? However, this Court's decision that Justice's only action lies within the ambit of BMA-66 allows only one solution. The allocation is as follows:

Justice must prove a violation of BMA-66, Section 5(B). To show this violation, Justice has to prima facie establish (1) that there are anticompetitive ef-

APPENDIX A

I

OPINION AND ORDER OF DECEMBER 29, 1966

[CAPTION OMITTED]

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Judge Harper dismissed the case with privilege to amend within twenty days. In the instant case, with the pleadings complete, the Government has taken an adamant position as hereinafter discussed.

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By the Court:

Thomas J. Clary,
Chief Judge.

II

Oral Decision, November 4

Before Hon. Thomas J. Clary, Chief Judge.

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Crocker, however, is distinguishable from the case at bar, and it is distinguishable on one fact. In *Crocker* the findings of the Comptroller were based on a public, evidentiary hearing which produced 1,605 pages of testimony and exhibits. There was no such hearing in the instant proceeding. Therefore, although the *Crocker* holding rules the instant case as a Court review of an agency decision, the question of scope of review comes under the rule of ***First National Bank of Smithfield, North Carolina* v. *Saxon***, 352 F. 2d 267 (4 Cir. 1965).

Smithfield involved a branch bank approval under 12 U.S.C. Section 36 in which the Comptroller approved a new branch without a hearing. The Court first held that a hearing was not required because 12 U.S.C. Section 36 made no provision for one. A hearing is only required when expressly directed by the empowering statute. Then, after this determination, the Court declared that weight is only to be given to the Comptroller's decision if after a Court hearing in law and in fact it is found that his decision rested on an exercise of discretion. This is because the Court will not substitute its discretion for the Comptroller's.

This Court finds *Smithfield* to be analogous to the instant case. The BMA–66, like 12 U.S.C. Section 36, has no requirement for a hearing before the Comptroller, thus allowing the Comptroller to act at his discretion. However, when there is no hearing, it cannot be contended that the findings of the Comp-

troller should be given given the weight of hearing based findings.

The basis for this conclusion is best seen in the following quote from *Smithfield*:

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The substantial evidence rule, therefore, may be invoked only when a proper foundation is laid for it as was done in *Crocker*.

Therefore, the Court will hear all evidence in law and in fact, and if after it has made its findings, it then appears that the decision of the Comptroller is dependent on an exercise of discretion, the Court will bow to that discretion. However, if from the fact findings, it appears that the Comptroller abused, exceeded, or arbitrarily applied his discretion, the Court will set it aside.

The other question requiring answer is how is the burden of proof to be allocated? However, this Court's decision that Justice's only action lies within the ambit of BMA-66 allows only one solution. The allocation is as follows:

Justice must prove a violation of BMA-66, Section 5(B). To show this violation, Justice has to prima facie establish (1) that there are anticompetitive ef-

fects, as defined in Section 5(B) and (2) that these anticompetitive effects are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. Only such a showing will make out a case for violation of BMA-66. Proof of anticompetitive effects solely is no longer controlling. A merger may be anticompetitive and yet be legal because it promotes the public interest as set forth in the Act. Therefore, for Justice to show illegality, it must prove first that a merger is not only anticompetitive, but also prima facie that it is not in the public interest.

If and when Justice establishes such a prima facie violation of BMA-66, the burden of producing evidence will shift to the Banks and the Comptroller to counter the Justice Department's proof.

Once the Banks and Comptroller have presented their case, Justice will be given an opportunity to rebut such matters as are raised by the Banks and Comptroller in regard to the convenience and needs test. In any event, however, Justice has the overall burden of persuasion to show the illegality of the merger.

III

Opinion and Order of October 13, 1966

[CAPTION OMITTED]

Clary, *Chief Judge:*

On December 6, 1965, the Central-Penn National Bank of Philadelphia and the Provident National Bank of Philadelphia applied to the office of the Comptroller of the Currency for permission to merge under the charter of the Central-Penn National Bank and with the title of Provident National Bank. The

report by the Board of Governors of the Federal Reserve System to the Comptroller of the Currency under Section 18(c) of the Federal Deposit Insurance Act on the competitive factors involved in the proposed merger dated January 7, 1966, was that "the overall effect of the proposed merger on competition would be significantly adverse." On the same day, the Attorney General of the United States reported, "There are strong reasons, therefore, for believing that the proposed merger would have an important adverse effect on competition within the Philadelphia banking market * * * the anticompetitive effects of this merger are important and considerable and there are likely to be no redeeming features." The Federal Deposit Insurance Corporation filed no comment.

On March 4, 1966, the Comptroller of the Currency approved the merger, and on March 31, 1966, filed his written decision in respect thereof. In that decision the Comptroller noted that this application to merge was the first filed by banks of significant size to be acted upon by his office since the passage of the 1966 Amendment to the Bank Merger Act. He stated, "The new law, passed by Congress to moderate the decisions of the Supreme Court in *U.S. v. Philadelphia National Bank; et al*, 374 U.S. 321 (1963) and *U.S. v. Lexington*, 376 U.S. 665 (1964), recognizes that traditional antitrust concepts cannot be applied to banking without substantial modification." His findings then followed sustaining the merger.

On April 1, 1966, the present action brought by the United States of America against Provident National Bank and Central-Penn National Bank of Philadelphia, defendants, was filed to enjoin the merger. On April 7, 1966, James J. Saxon, Comptroller of the Currency, intervened and thus is a party to the action, as provided by Section 1828(c)(7)(D) of Title 12, United States Code. Since under the provisions

of the afore-quoted Section 1828 of Title (12) a novel situation has been brought about wherein two departments of the Executive Branch of the Government are litigating one against the other, with the approval of the Congress of the United States, it will be necessary to delineate in this Opinion to which branch of Government is being referred. Consequently, for the purposes of this Opinion, the plaintiff hereafter will be referred to as "Department of Justice" or "Justice"; the defendant Provident National Bank as "Provident"; the defendant Central-Penn National Bank of Philadelphia as "Central"; the joint defendants as "Banks"; the Comptroller of the Currency as "Comptroller" or "Intervenor", and the Bank Merger Act, Public Law 89-356, 64 Stat. 892, will be referred to as "BMA-66". The stated purpose of the aforesaid Act, as set forth in the slip sheet publication reads as follows:

> To establish a procedure for the review of proposed bank mergers so as to eliminate the necessity for the dissolution of merged banks, and for other purposes.

The pertinent pleadings to date which are essential to a decision on the present motions consist of a complaint filed by Justice, a joint answer filed by the Banks, the order permitting intervention of James J. Saxon, Comptroller of the Currency, answer of the Comptroller, motion of the Comptroller to dismiss, and motion of the Banks to dismiss. The basis for each of the motions to dismiss is that the complaint "fails to state a claim upon which relief can be granted."

There is no question that a law suit was started by Justice to enjoin the merger before the thirtieth calendar day after the date of approval by the agency (March 4, 1966). Thus, Justice has met the fundamental requirement of BMA-66, Title 12, Section

(c)(7)(A), which prohibits any litigation challenging the merger after the thirtieth calendar day following approval. Justice has met the statutory limitation of action in that regard. A reading of the complaint leaves no doubt that Justice intended to plead, and did plead, a case of antitrust violation strictly in accordance with Section 7 of the Clayton Act (15 U.S.C., Section 18) and has attempted to ignore completely BMA-66. There are too many pointed references in the complaint challenging all alleged violations of antitrust law as contravening Section 7 of the Clayton Act only. Justice bottoms its case on the decision of the Supreme Court in *U.S. v. Philadelphia National Bank, et al.*, 374 U.S. 321 (1963). It is this specific pleading of Justice charging a violation of Section 7 which is relied upon by the Banks and the intervening Comptroller in their motions to dismiss. The Banks and Comptroller insist that a Section 7 action is no longer available to Justice in a merger or consolidation of the type involved in the instant case, and that any actions must be grounded in BMA-66 and no other statute in the light of the wording of BMA-66. The Banks and Comptroller urge that since Justice has failed to ground its action in a challenge under BMA-66 within the thirty day period, and that since such failure is substantive rather than procedural, the limitations contained in BMA-66 are applicable, that the Court is thus without jurisdiction, and the action must be dismissed. In plain language they insist that Justice has deliberately sought to avoid any requirements contained in BMA-66 which deletes "line of commerce" and adds another facet to the standards governing bank mergers, i.e., if anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served,

the agency in question is authorized to approve a proposed merger. This intransigence of Justice, they contend, is substantive, not procedural, and thus fatal to the position of Justice.

The weakness of the contentions of the Banks and of the Comptroller lies in the fact that we are now only at the notice pleading stage. The complaint specifically charges that the history of commercial banking in the four-county area of Philadelphia has been one of consolidations, mergers and acquisitions, with a heavy concentration of the business of commercial banking within a relatively few banks; that Provident controlled 9% of the total assets, 9% of the total loans, 9% of the total PIC [sic] deposits, 10% of the total IPC demand deposits, and 9% of the banking offices doing business in the four-county area; that Central-Penn, the sixth largest commercial bank in the four-county area, controlled 5% of the total assets, 5% of the total loans, 5% of the total IPC deposits, 5% of the total IPC demand deposits, and 6% of the banking offices doing business in the four-county area; that Provident is the product of seven mergers or consolidations since 1947, and Central-Penn is the product of six such mergers or consolidations since 1949; that the proposed merged bank would be the fourth largest bank in the area, controlling 14% of the total assets, 14% of the total loans, 14% of the total IPC deposits, 15% of the total IPC demand deposits, and 15% of the banking offices of 36 banks doing business in the four-county area. Also, Justice contends that after the proposed merger, the five largest banks in the area would control 78% of the total assets, 79% of the total loans, 76% of the total IPC deposits, 77% of the total IPC demand deposits, and 63% of the banking offices of 36 banks doing business in the area; that it would destroy competition between each other and other banks, and that it would substantially

lessen competition or tend to create a monopoly. It also charges that competition generally in the commercial banks in the four-county area will be substantially and unreasonably lessened, and that concentration in commercial banking in the four-county area will be substantially and unreasonably increased.

It cannot be gainsaid that if Justice had seen fit to plead generally and without reference to any particular statute, instead of specifically proceeding under Section 7 of the Clayton Act, and these factors pleaded might result in a violation of antitrust laws, the Court would of necessity have to hear the case. The only question for decision then is, does the reference solely to Section 7 invalidate the cause of action filed by Justice? For reasons hereafter set forth, this Court decides that it does not.

The purpose of notice pleading is merely to inform opposing parties what such opposing parties have to meet and defend. Justice charges a violation of antitrust laws, despite its insistence upon Section 7. Thus, suit is brought under antitrust laws of the United States.

The reference to a statute as being the basic ground upon which an action is brought, even if completely incorrect, is no ground for the dismissal of an action where there is a statute in existence which would warrant a valid cause of action for which relief could be granted upon the facts as pleaded. *Missouri, K. & T. R. Co. v. Wulf*, 226 U.S. 570 (1913). This case involved a complaint based upon a state statute which had been repealed by the enactment of a federal statute not mentioned in the complaint. Mr. Justice Pitney, writing for the Court, held that the Court was presumed to be cognizant of the enactment and that the pleader was not required to refer to the federal act. He further stated that reference to the state statute no more vitiated the pleading than a reference

to any other repealed statute would have done. It was only important that there were sufficient allegations to support an action under the new federal act.

The modern theory of notice pleading is one of even greater liberality, thus bolstering the decision reached in *Missouri K. & T. R. Co. v. Wulf, supra*. Today, the basic principle is that pleadings are no longer to be held to the rigid standards of the common law and neither absolute clarity nor absolute precision is required. *United States v. Crown Zellerbach Corporation*, 141 F. Supp. 118 (N.D. Ill. 1956). It is enough to sustain a pleading against a motion to dismiss that a defendant is informed with reasonable particularity of a legally cognizable claim against him. If the plaintiff could recover on any state of facts, which it might prove in support of its allegations as laid, a motion to dismiss will be denied. *Conley v. Gibson*, 355 U.S. 41 (1957); *Melo-Sonics Corporation v. Cropp*, 342 F. 2d 856 (3 Cir. 1965); *Fuller v. Highway Truck Drivers & Helpers Local 107*, 233 F. Supp. 115 (E.D. Pa. 1964); *Miller v. Bargain City, U.S.A. Inc.*, 229 F. Supp. 33 (E.D. Pa. 1964).

Therefore, today the legal averments of a pleading are not so important as long as there are allegations which if proved most favorably to plaintiff, would permit recovery under the laws of the United States. If, in such a complaint, there also appears a reference to an irrelevant statute, or if no statute is mentioned, the Court need only take judicial notice of the relevant statute. As stated in *Buell v. Sears, Roebuck & Co.*, 321 F. 2d 468 (10 Cir. 1963), it is not necessary to plead what may be judicially noticed. And, it is hornbook law that federal acts are a proper subject for judicial notice.

There is a further principle of pleading which has been recognized in federal procedure since *United States v. Morris*, 23 U.S. 246, 6 L. Ed. 314 (1825),

that a subsequent pleading of an adversary, if not thereafter denied, may cure a defect in a prior pleading. *Cole* v. *Ralph*, 252 U.S. 286, 40 S. Ct. 321, 64 L. Ed. 567 (1920); *Albertson* v. *Federal Communications System*, 87 U.S. App. D.C. 39, 182 F. 2d 397 (1950); *Bullen* v. *DeBretteville*, 239 F. 2d 824 (1956). This principle applies to substantive as well as procedural omissions.

In the first defense of their answer, defendants claim that any action lies only under BMA–66. In their second defense, the defendant Banks put into controversy the question as to whether all right of Justice to enjoin the merger is vested in BMA–66. The answer of the Comptroller likewise puts into controversy the Bank Merger Act of 1966 by its prayer for relief.

We have long passed the stage peculiar to common law pleading that a failure in form of pleading vitiates the entire proceeding. This is an important case to all and is not a private quarrel between two branches of the Executive Department. The Congress of the United States has, for the first time, permitted two co-ordinate branches of the same department of Government to litigate opposite views in a judicial proceeding, thus affording one department of the Executive Branch, aggrieved by an alleged arbitrary position of the Department of Justice, to properly present for the first time before the Judicial side of the Government its contention when it is in violent disagreement with the Department of Justice. While quite novel, in view of increasing differences between departments of Government, the provision is undoubtedly necessary.

In denying the motions to dismiss at this time, the Court does not sustain the position of Justice that it is entitled to sue under Section 7 of the Clayton Act. The only suit open to Justice to enjoin a bank

merger lies solely within the ambit of BMA-66. It is not necessary at this time to decide the question of burden of proof, whether on Justice or on the Comptroller and Banks. That will be ruled upon in later pre-trial procedures.

ORDER

AND NOW, to wit, this 13th day of October, 1966, for the reasons set forth in the foregoing Opinion, it is ORDERED, ADJUDGED AND DECREED that defendants' Motion to Dismiss and intervenor's Motion to Dismiss be and they are hereby DENIED.

By the Court:

THOMAS J. CLARY,
Chief Judge.

APPENDIX B

Statutes Involved

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Section 18(c) of the Bank Merger Act, as amended, 80 Stat. 7, 12 U.S.C. 1828(c) (1966 Supp.), provides in pertinent part:

> (5) The responsible agency shall not approve—
>
> (A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or
>
> (B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the

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anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

* * * * *

(7)(A) Any action brought under the antitrust laws arising out of a merger transaction shall be commenced prior to the earliest time under paragraph (6) at which a merger transaction approved under paragraph (5) might be consummated. The commencement of such an action shall stay the effectivness of the agency's approval unless the court shall otherwise specifically order. In any such action, the court shall review de novo the issue presented.

(7)(B) In any judicial proceeding attacking a merger transaction approved under paragraph (5) on the ground that the merger transaction alone and of itself constituted a violation of any antitrust laws other than section 2 of [Title 15], the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5).

APPENDIX C

DECISION OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATION TO MERGE CENTRAL-PENN NATIONAL BANK OF PHILADELPHIA, PENNSYLVANIA, AND PROVIDENT NATIONAL BANK, PHILADELPHIA, PENNSYLVANIA, UNDER THE CHARTER OF THE FORMER AND WITH THE TITLE OF PROVIDENT NATIONAL BANK

THE COMPTROLLER OF THE CURRENCY,

[SEAL] THE ADMINISTRATOR,
OF NATIONAL BANKS,
Washington.

Decision of the Office of the Comptroller of the Currency on the Application To Merge Central-Penn National Bank of Philadelphia, Philadelphia, Pennsylvania, and Provident National Bank, Philadelphia, Pennsylvania, Under the Charter of the Former and With the Title of Provident National Bank

STATEMENT

On December 6, 1965, the Central-Penn National Bank of Philadelphia, Philadelphia, Pennsylvania, and the Provident National Bank, Philadelphia, Pennnsylvania, applied to the Office of the Comptroller of the Currency for permission to merge under the charter of the former and with the title of Provident National Bank.

This application to merge is the first filed by banks of significant size to be acted upon by this Office since the passage of the 1966 Amendment to the Bank Merger Act. The new law, passed by Congress to moderate the decisions of the Supreme Court in *U.S. v. Philadelphia National Bank, et al.*, 374 U.S. 321 (1963) and *U.S. v. Lexington* 376 U.S. 665 (1964), recognizes that traditional anti-trust concepts cannot be applied to banking without substantial modification. If a realistic view is to be taken, it must start with a rejection of the traditional anti-trust concepts which Congress has recognized to be inapplicable to the banking industry. Congress, relying on the specialized knowledge of the banking agencies, has given them the task of interpreting the new statutes.

The significant provisions controlling agency action on a bank merger application are set forth in Section 5(B) of the new Act.[1] This section permits the responsible agency to balance the convenience and needs of the community, considering the managerial and financial resources of the participating banks and the resulting bank, which the merger will serve against the anti-competitive effect the merger may produce. If the convenience and needs of the community to be served clearly outweigh the anti-competitive aspects, the merger must be approved.

The first question to be considered, therefore, is the impact of the proposed merger on competition. Competition among financial institutions, as in other in-

[1] Section 5(A), which provides that the responsible agency shall not approve a bank merger which would result in a monopoly or constitute an attempt to monopolize the business of banking, is not applicable in this case.

dustries, must exist in a certain market referred to in the statute as a "section of the country." The extent of this market is dependent upon the various services provided by financial institutions. While virtually all banks and other financial institutions compete on the local neighborhood basis for the deposits of the average householder, only the larger institutions can successfully compete in the national market for the large credits of industrial and commercial customers doing business throughout the nation. Only a limited number of American banks compete in the international market. Thus, in this case, as in every other to arise under the new law, the extent and degree of competition among the applicant banks and other financial institutions must be evaluated in all its aspects. It no longer suffices to say that since some competition among banks, either actual or potential, is eliminated, the merger is to be condemned.

Although both Provident National Bank and Central-Penn National Bank, the participants in this proposal, are headquartered in Philadelphia and both operate branch bank systems in the four-county area comprised of Philadelphia, Bucks, Delaware and Montgomery Counties, as is permitted by state statutes, this area does not constitute the "section of the country" under the new statute. Although the Supreme Court in the Philadelphia case ruled that this four-county area was the relevant market when interpreting Section 7 of the Clayton Act, the new statute, designed to modify that decision, permits a new and realistic approach. Money, either in the form of savings, deposits, or credits, moves with great ease and rapidity; its flow is not impeded by political boundary lines. The movements of money in and out of a bank are determined by the convenience and needs of its many and varied customers, whose scat-

tered addresses serve to define the extension of the bank's market. Thus, the branch banking laws of the states do not effectively define a bank's market. In this case, while it is proper to examine competition among branches for local retail and household deposits, it is also necessary to view total competition among all financial institutions in the Philadelphia area, including the adjacent sections of New Jersey, as well as in the northeastern part of the United States.

The proximity of New York City, the Nation's financial center, means that the Philadelphia banks also face strong competition from New York banks. Judge Clary, in his District Court opinion in the *Philadelphia* case, stated then, as is still more clearly the case today, that:

> The evidence demonstrated beyond peradventure of doubt that the Philadelphia area, plus parts of Delaware and New Jersey, and also New York City, as well as most of the northeastern part of the United States, is the area of active competition for Philadelphia commercial banks and for the proposed merged bank. The testimony discloses that the competitive effect upon all Philadelphia commercial banks will be minimal. The larger bank, however, will be able to compete on better terms and in a better atmosphere with the banks of other cities and states that have been draining this area of banking business which might well be and perhaps properly should be handled here, and which cannot be handled under present circumstances. That it will benefit the city and area has been established clearly by a fair preponderance of the evidence.

Though Section 5(b) of the 1966 Amendment to the Bank Merger Act bears some resemblance to Section 7 of the Clayton Act, the difference is most

marked in that the new bank merger statute makes no reference to "line of commerce." The new statute allows consideration of a bank merger in the context of all competing financial institutions operating in the market. It is thus much more realistic than the narrow *Philadelphia* rule. Henceforth, the competitive impact of a bank merger must be assessed in the light of savings banks, insurance companies, savings and loan associations, credit unions, finance companies, small loan companies, factors, and even department stores and mail order houses, that compete for the credit lines or the savings dollar of the public.

The Provident National Bank and the Central-Penn National Bank, respectively the fifth and seventh largest commercial banks in Philadelphia, serve a standard metropolitan statistical area which is the second in size in the eastern United States. The Philadelphia standard metropolitan statistical area is comprised of Philadelphia County, which is coextensive with the city, Bucks, Chester, Delaware and Montgomery Counties in Pennsylvania, as well as Burlington, Camden and Gloucester Counties in New Jersey. This area, an important segment in the rapidly expanding megalopolis of the eastern seaboard, has an estimated population of 4,300,000 people. More than 25,000,000 people live within 100 miles of Philadelphia. Only by evaluating this proposed merger against the social, economic and financial resources at work in this vast and densely populated area can its impact be assessed. Its competitive effect must be viewed in the light of the overall financial structure of this area; its beneficent effect upon convenience and needs of this area must be seen in the perspective of the commercial, industrial, cultural and sociological composition of the area.

A comprehensive view of the Philadelphia area economic base reveals that it is comprised not only of many large, medium-sized and small industrial companies out also of a wide range of wholesale and retail establishments and service companies in addition to educational, governmental and research facilities. The 1963 U.S. Department of Commerce Census of Business gives the following statistics for the Philadelphia area: 8,125 manufacturing plants with a total payroll of $3,320,970,000 and value added of $5,987,310,000; 7,476 wholesale establishments with a payroll of $530,541,000 had sales of $10,252,356,000; 39,358 retail stores with a payroll of $666,822,000 had sales of $5,737,442,000; and 22,809 selected service establishments with payrolls of $321,010,000 had receipts of $1,074,494,000.

This highly diversified Philadelphia area economy presents needs for the widest possible range of banking services. Nearly 90% of all classes of manufacturing output as recognized by the U.S. Department of Commerce are represented in this metropolitan area. The proportion of the nation's value added in five major industries by Philadelphia-based companies is as follows: petroleum and coal, 5.8%; apparel, 5%; chemicals, 4.6%; rubber and plastics, 4.4%; and fabricated metals, 5.1%.

The significance of manufacturing to the Philadelphia area is attested by the fact that some 35% of all gainfully employed workers are on the payrolls of manufacturing plants. The employment profile of the area is as follows: manufacturing durable, 17.3%; manufacturing non-durable, 17.6%; trade, 19.8%; service and miscellaneous, 15.2%; government, 12.9%; transportation and utilities, 7%; finance, insurance, and real estate 5.5%; and construction, 4.7%.

Though manufacturing is especially important to

the Philadelphia area, no single segment dominates its economy. Only two industries, electrical machinery and apparel, account individually for more than 10% of manufacturing employment. In the electrical equipment field the presence of Electric Storage Battery, I-T-E Circuit Breaker Co., International Resistance and Progress Manufacturing together with major establishments of Radio Corporation of America, General Electric, Burroughs, Philco, Sperry Rand and Westinghouse make this area one of the world's greatest concentrations of electrical and electronics manufacturing plants. In the apparel field, the area's second largest manufacturing indnstry, there are a great many small, independently operated firms among which are many with a long history in the business.

Other manufacturing industries contribute to the prosperous economic base of this area. There are some 700 metal manufacturers, such as Lukens Steel and Alan Wood Steel. U.S. Steel also maintains its famous Fairless Works in this area. The Budd Company, long a leading supplier of transportation equipment, is expanding its local operations to include work in metallurgy, electronics and plastics. Pennsylvania Sugar and Franklin Sugar make the area a leader in sugar refining. Leeds and Northrup, a local firm, manufactures instruments here, as do plants of Honeywell. Chilton and Curtis are great names in publishing. Scott Paper is a Philadelphia-based national leader in the paper industry. SKF Industries makes bearings and has major plants here. Campbell Soup has its headquarters just across from Philadelphia, in Camden, New Jersey. Much of the manufacturing potential of the Philadelphia area is directed to the production of military supplies and national defense material.

Philadelphia is the site of a United States Mint and a center for other civilian federal functions, as well as for activities of the Commonwealth of Pennsylvania.

The wholesale and retail trades employ 19.8% of the area workers and account for $15.990 billion in annual sales. Two of the nation's ten largest merchandising firms, Acme Markets, with annual sales of $1.161 billion, and Food Fair Stores, with annual sales of $1.105 billion, are among this number.

In the petro-chemical industry, the Philadelphia complex ranks second in the nation. The two locally headquartered firms in the oil area are Atlantic Refining, with $636 million in annual sales, and Sun Oil, with $838 million in annual sales. Other oil producing and processing firms with plants in the area are Gulf, Mobil and Sinclair, which are among the country's largest. The chemical industry located in the area has grown spectacularly between 1958 and 1962, when its value added increased 35% and its employment increased 12%. Recent plant and equipment investments by such firms as Rohm and Haas, Pennsalt, DuPont and Thiokol indicate the vitality of this industry. Pharmaceutical plants, a specialized chemical industry, have also contributed to Philadelphia's recent growth. The Smith, Kline and French Laboratories, and William H. Rorer have recorded excellent profits. Wyeth; Merck, Sharp and Dohme; McNeil, and other famous firms with manufacturing and research laboratories have contributed to the economy of the area.

The Philadelphia area has become a national center of research and development, especially in the biomedical sciences and electronics, because of the close cooperation among industry, independent research institutions and the area's colleges and universities. A

new Science Center, near the campuses of Drexel Institute of Technology and the University of Pennsylvania, will further foster and extend this cooperation. The Franklin Institute conducts industrial research in its independent laboratories in chemistry, physics, electronics and engineering. National Science Foundation data indicate that, in 1962, 3,700 scientists were engaged in research and development in the Philadelphia metropolitan area. Their efforts were concentrated in chemistry, physics, and the biological sciences.

Another very significant factor contributing to the economic base of the Philadelphia standard metropolitan statistical area is its seaport. This port, which is part of a vast complex stretching from Trenton, New Jersey, on the north to Wilmington, Delaware, on the south, serves thirteen states in which one-third of the nation's population lives and works. Having handled 108.9 million short tons in 1964, it ranks second only to New York in total water-borne commerce and is first in foreign commerce. Its importance to the economy of the area can hardly be exaggerated; it provides, directly or indirectly, more than 96,000 jobs and 20% of all manufacturing jobs depend on raw materials received through the port.

The port can accommodate 150 deep-draft vessels at its docks, and a 40-foot channel has been dredged up river to the U.S. Steel Fairless plant. Three trunk line railroads run direct to shipside and are interconnected by the Philadelphia Belt Line Railroad. Over-the-road service to all parts of the United States and Canada from this port is furnished by approximately 350 motor truck lines. The port has three ore piers with unloading capacity of 5,600 tons per hour; six oil docks with storage capacity of 9,900,000 barrels; two grain elevators with a capacity

of 4¾ million bushels; three coal tipples with capacity of 37,500 tons per eight-hour day; eighty-one warehouses for general storage with 13.5 million square feet of space; and nine cold storage warehouses with nearly 12 million cubic feet of space.

Since colonial days, educational, scientific and cultural activities have contributed to the economic vitality of Philadelphia and its environs. Today there are 54 colleges and universities, including six major medical schools and 129 hospitals, as well as many other respected scientific and cultural institutions serving the area's needs.

Philadelphia is also a major transportation center. Of the railroads serving the city, the Pennsylvania Railroad and the Reading Company are locally headquartered. The International Airport, located only twenty minutes from the center of the city, is becoming an attraction for new business development. Philadelphia is also served by a network of superhighways centering on the Pennsylvania and New Jersey Turnpike.

The City of Philadelphia faces severe problems typical of many American urban centers today. It has experienced a substantial exodus of population to the suburbs and those who moved out have been replaced mostly by unskilled immigrants from the south, who, due to their lack of training, are handicapped in finding employment. Efforts have been made by both government and private citizens to revitalize the economy of Philadelphia and a number of projects are presently in progress. In the field of housing, a massive plan has been set in motion to replace substandard housing facilities in the city. Steps are also being taken to improve cargo handling facilities.

Against this background of the Philadelphia area's manufacturing, commercial, scientific and cultural base, it is appropriate to examine the financial resources available to meet its expanding credit needs. Such an examination must, of necessity, encompass not only commercial banks but also the savings banks, savings and loan associations, insurance companies, small loan companies, credit unions, factors and other financial institutions.

Such an analysis of the Philadelphia area financial structure must consider the 84 commercial banks, operating 515 offices, with total assets of $8.495 billion; four mutual savings banks having withdrawable balances of $2.861 billion; 260 savings and loan associations with $2.555 billion in total assets; 300 insurance companies, including seven large Philadelphia-based insurance companies with assets of $3.846 billion; 285 credit unions in the city of Philadelphia alone; and about 100 sales finance companies, about 300 small loan companies, and 15 factoring offices, the aggregate Philadelphia resources of which are unavailable. Direct governmental lending agencies are competitive to a lesser extent than the private financial institutions.

Philadelphia, the fourth largest metropolitan area in the nation, has a relatively low concentration of banking resources. Out of 34 standard metropolitan statistical areas with limited branching, the Philadelphia area ranks only 25th in terms of concentration based on the five largest banks in each area.

Of the 84 commercial banks located in the Philadelphia area, only three have total deposits of more than one billion dollars. The largest of these is the First Pennsylvania Banking and Trust Company, which has total deposits of $1.459 billion and operates 45 branch offices. The second is the Philadelphia

National Bank, with deposits of $1.292 billion and 36 offices. Girard Trust Bank, with $1.013 billion in deposits and 50 branches, is third. None of these banks, which rank 19th, 26th and 37th, respectively, among the nation's commercial banks, are near the size of the Mellon National Bank of Pittsburgh.

The charter bank, with IPC deposits of $260 million, was originally organized in 1864 as the Central National Bank. It acquired its present title in 1930 when Central National Bank merged with Penn National Bank. During the last five years, however, it has had no mergers. The charter bank presently operates twenty-four offices throughout Philadelphia, Bucks, Montgomery, and Delaware Counties. Central-Penn has specialized in medium-sized local business loans and has built up over the years a strong and experienced commercial loan department. The bank needs additional capital to support its existing volume of business. Its head office is inadequate and congested. The renovated quarters of the resulting bank and its new accounting center will alleviate this problem.

The merging bank, with IPC deposits of $471 million, was originally incorporated in 1922 as Provident Trust Company of Philadelphia to take over the banking and trust business of Provident Life and Trust Company; it became a national bank in 1964. The Provident National Bank is presently operating thirty-three offices throughout Philadelphia, Bucks, Montgomery, and Delaware Counties. Besides being a strongly capitalized bank, Provident has one of the largest trust departments in the Philadelphia area, as well as an established international division, and a specialized construction loan department. Among the remaining area banks, there are ten with resources

of $100 million and over, which assure a satisfactory range of services to the medium-size customer.

Commercial banks compete not only with each other, but with many other types of savings and financial institutions strongly represented in the area. There are four mutual savings banks with head offices in Philadelphia operating more than 50 branches in the metropolitan area and having withdrawable balances of $2.861 billion. These institutions are well managed, with records of sound operation dating from 111 to 149 years. The Philadelphia Savings Fund Society, the major savings bank, is the largest bank in Eastern Pennsylvania. These mutuals have paid a high rate of interest on regular savings accounts, which has contributed much to the amazing growth rate of their savings deposits of 51.9% over 1960.

Insured savings and loan associations, with $2.555 billion in total assets, compete vigorously in the metropolitan area for personal savings and also solicit corporate funds. Emphasizing the savings function, the high dividend rate, federal insurance and, frequently, valuable premiums on new accounts, they successfully compete with mutual savings and large commercial banks for savings and mortgage loans. There is no area in the city where the commercial banks are not in direct competition with a nearby office of a savings and loan association. Moreover, many out-of-state savings and loan associations from as far away as California solicit deposits by mail, emphasizing the high interest rates offered. First Pennsylvania cited the drain of deposits resulting from such out-of-state competition as a principal reason for its recent decision to offer five-year, 4½% savings bonds, now also offered by most other Philadelphia banks. It is significant that savings deposits and mortgage loans of the eight largest Philadelphia

commercial banks amounted in the aggregate to only 16.94% and 6.99%, respectively, of the combined totals for such banks, the four mutual savings banks, and the insured savings and loan associations in the area as of December 31, 1964.

There are more than 300 insurance companies with offices in the city. The seven largest insurance companies with headquarters in Philadelphia are: Pennsylvania Mutual Life, with assets of \$2,068,973,000, mortgage loans of \$625,256,000, and policy loans of \$140,358,000; Provident Mutual Life, with assets of \$989,936,000, mortgage loans of \$328,387,000 and policy loans of \$58,626,000; Fidelity Mutual Life, with assets of \$442,770,000, mortgage loans of \$146,061,000, and policy loans of \$30,216,000; Philadelphia Life, with assets of \$109,355,000, mortgage loans of \$36,822,000 and policy loans of \$6,646,000; Presbyterian Ministers' Fund, with assets of \$95,760,000, mortgage loans of \$19,098,000 and policy loans of \$6,428,000; Home Life, with assets of \$95,338,000, mortgage loans of \$45,612,000 and policy loans of \$3,039,000; and Life Insurance Company of North America, with assets of \$44,716,000, mortgage loans of \$7,660,000 and policy loans of \$1,354,000. The three largest companies have been very active in private placement financing; they are joined in competition for local financing by all of the leading national life insurance companies and many Canadian companies as well. All of these and many smaller companies actively solicit real estate mortgages for investment. Some companies maintain their own mortgage offices in Philadelphia while others rely upon local mortgage service companies for their supply.

There are reported to be 285 credit unions in the urban Philadelphia area. There are no statistics on the number of credit unions in the entire metro-

politan area. Credit unions make the most of their competitive position, emphasizing mutual ownership, low interest rates on loans, in some cases the payroll deduction method of loan repayment and savings, and convenience of access to credit union facilities.

There are about 100 sales finance companies and about 300 small loan and consumer discount companies operating within the service area of the resulting bank. Many of these companies have large branch office systems. Beneficial Finance Companies have 14 offices, Household Finance Corporations have 26 offices, and Ritter Finance Companies have 18 offices. All of these companies compete aggressively with commercial banks for automobile, home modernization, and personal loan financing.

There are 15 factoring companies with offices in the city of Philadelphia. These companies compete in the accounts receivable finance market.

The consummation of the proposed merger will not result in the elimination of a significant amount of competition between the applicant banks. Provident and Central-Penn face branch office competition from the offices of the largest Philadelphia banks rather than from each other, except in the immediate Philadelphia downtown area. For this reason, a minimal number of common accounts exists between them. There are only 28 mutual customers out of a combined total of 3,277 savings accounts with balances of $10,000 or more; nine mutual holders of the new 4½% savings certificates of each bank out of a total of 2,512 accounts; eight mutual depositors out of 444 with certificates of deposit; and four mutual customers with open time deposit balances in excess of $10,000 out of 281 accounts. A comparison of all regular checking accounts with balances of $10,000 or more in each bank disclosed only 139 mutual ac-

counts out of 6,614, and a comparison of loan balances of $10,000 or more for each bank disclosed only 32 mutual borrowers out of 3,287. As to consumer credit customers of the two banks, due to the complementary branch systems and differences in the sources of dealer paper, it is doubtful that more than an insignificant overlap is involved.

The following analysis of the dispersion of the branch offices of the applicant banks clearly reveals the limited extent to which the banks compete for the deposits of the small retail customers. As previously noted, Pennsylvania law permits branching into the counties contiguous to the home county, and while both banks operate branch offices in Philadelphia and at least one office in each of the three contiguous counties, the locations of these offices are such that, except in the downtown area, they are not in significant competition with each other. Of the twenty-four offices Central-Penn presently operates throughout this four-county area, thirteen are located in Philadelphia: four downtown, three to the north of the downtown area, four to the west, and two to the south. Provident is presently operating thirty-three offices in the four-county area, twenty of which are located in Philadelphia: five downtown, one immediately outside of the downtown area, eleven north of the downtown area, two west, and one south. In Delaware County, Provident is well represented with six offices, while Central-Penn has but one. On the other hand, Central-Penn has eight offices in Lower Bucks County, while Provident has two offices in Upper Bucks County. In Montgomery County, Provident has five offices, two in the southwest section, two in the northeast section and one in the west-central part, while Central-Penn has only two offices in the southeastern section of the county. Subsequent discussion will

show that the participating banks' branches in these last three counties do not compete with each other because of their locations. These branches, in fact, will complement one another when the merger is consummated.

In downtown Philadelphia, the main office of Central-Penn is located at the corner of Broad and Walnut Streets, only a block away from the main office of Provident at the corner of Broad and Chestnut Streets. Within .4 of a mile of Provident's office are eight commercial banks, some with several offices; two savings banks; one savings and loan association; ten finance and small loan companies; four credit unions; and twelve insurance companies. Central-Penn's office is within .3 of a mile of eight commercial banks, one savings bank, six savings and loan associations, twenty-six finance and small loan companies, two credit unions, and two insurance companies.

Competition also exists among the branch offices of the two banks located at 21 South 12th Street, 12th and Chestnut Streets, and Market and Juniper Streets. These offices are in the same area. However, within .3 of a mile from Provident's office at 21 South 12th Street are five commercial banks, three savings banks, two savings and loan associations, ten finance and small loan companies, and four credit unions. Central-Penn's office at 12th and Chestnut Streets is within .5 of a mile of four commercial banks, two savings banks, six savings and loan associations, sixteen finance and small loan companies, three credit unions, and one insurance company. Within .4 of a mile from Central-Penn's office at Juniper and Market Streets are three commercial banks, a savings bank, three savings and loan associations, six finance and small loan companies, and two insurance companies.

No significant competition exists among any of the other branch offices of the applicant banks, although a few of these are relatively close to each other.

Offices of the two applicant banks located in downtown Philadelphia at 17th and Arch Streets, and at 17th and Chestnut Streets are separated by three long blocks traversing Penn Center, an office redevelopment area. Within .3 of a mile from Provident's office are nine commercial banks, three savings banks, twelve savings and loan associations, five finance and small loan companies, and one credit union. Central-Penn's office is within .3 of a mile of six commercial banks, three savings banks, one savings and loan association, four finance and small loan companies, three credit unions, and two insurance companies.

Other branch offices of the applicants in downtown Philadelphia, which are located in the same area, are those at 7th and Chestnut Streets and at 4th and Chestnut Streets. All the major banks are represented in this section. Within .3 of a mile from Central-Penn's office located at 7th and Chestnut Streets are three commercial banks, a savings bank, three savings and loan associations, three finance and small loan companies, two credit unions, and nine insurance companies. Provident's office located at 4th and Chestnut Streets is within .3 of a mile of seven commercial banks, three savings and loan associations, one finance and small loan company, two credit unions, and one insurance company.

The office of Central-Penn, located at 2nd and Pine Streets, is seven blocks away, and separated by the Independence National Historical Park, from Provident's office located at 4th and Chestnut Streets. No competition exists between the two offices because of the distance, difference in neighborhood and the barrier created by the park. The draw area of the 2nd

and Pine office is principally South Philadelphia rather than downtown Philadelphia. Within a mile from Central-Penn's office are three commercial banks, a savings and loan association, and one finance and small loan company.

In heavily populated West Philadelphia, Central-Penn's office at 58th Street and Baltimore Avenue and Provident's office at 19 South 52nd Street are 1.5 miles apart and thus have separate service areas. Within one mile of Central-Penn's office are three commercial banks, one savings and loan association, and two finance and small loan companies. Provident's office is within 1.3 miles of three commercial banks, two savings banks, five savings and loan associations, seven finance and small loan companies, four credit unions, and one insurance company.

In North Philadelphia, the office of Central-Penn at Broad Street and Glenwood Avenue and the office of Provident at 3314 Germantown Avenue are .7 of a mile apart and are separated by the main tracks of the Pennsylvania Railroad and by Allegheny Avenue, a major thoroughfare. Central-Penn's office serves the area south of these boundaries and is within .6 of a mile of two commercial banks, a savings bank, three savings and loan associations, four finance and small loan companies, and five credit unions. Provident's office, serving the business and population north of Allegheny Avenue and the railroad, is within .6 of a mile of four offices of two commercial banks, a savings bank, three savings and loan associations, and two finance and small loan companies.

Central-Penn's office at 5th and Wyoming Avenue and Provident's office at Broad and Louden Streets are a mile apart and serve different areas which are separated by the Northeast Expressway. The Wyoming office of Central-Penn does not serve the area

along Broad Street which is within the service area of the Broad and Louden office of Provident. Likewise, the Provident's office does not serve the business along 5th Street south of Wyoming Avenue. Central Penn's office is within one mile of three commercial banks, five savings and loan associations, five finance and small loan companies, and one credit union. Provident's office is less than .5 of a mile from one commercial bank, one savings bank, two savings and loan associations, four finance and small loan companies, and one credit union.

Central-Penn's office at 7325 Stenton Avenue and Provident's office at 78th Street and Ogontz Avenue are 1.75 miles apart. The road pattern of the area obviates competition between them. Central-Penn's office is within 1.5 miles of three commercial banks, two savings banks, and two savings and loan associations. Provident's office is within one mile of nine commercial banks, three savings banks, five savings and loan associations, one finance and small loan company, one credit union, and two insurance companies.

In Delaware County, the office of Central-Penn located at 301 Baltimore Pike, Springfield, and the office of Provident at Hart Lane and Saxer Avenue, Springfield, are approximately 1.2 miles apart. Within one mile from Central-Penn's office are four commercial banks, two savings and loan associations, two finance and small loan companies, and a savings bank. Provident's Springfield office is within 2.2 miles of six commercial banks, two savings banks, two savings and loan associations, four finance and small loan companies, and two credit unions.

In Montgomery County, the offices of Central-Penn located at King of Prussia Industrial Park, Upper Merion Township, and the office of Provident at King of Prussia Plaza, Upper Merion Township, are 1.2

miles apart. They are separated by the Pennsylvania Turnpike. Because of limited overpasses and underpasses, these offices are about 2.8 miles apart by either the eastern or western route. Driving this distance during rush hours can take from fifteen minutes to half an hour. Central-Penn's Industrial Park office cannot adequately serve the population drawn to the stores in the shopping center. Provident's office is within 1.75 miles of four commercial banks and two savings banks, and within .5 of a mile of a savings and loan association, and two finance and small loan companies.

In Bucks County there is no competition between the branches of the participating banks. While Provident has two offices in the upper part of the county and Central-Penn has eight in the lower part of the county, the closest offices are 18 road miles apart.

Thus it is evident that the overall competition among the branches of Provident and Central-Penn is not significant. It is pertinent, moreover, to note the kind of branching systems of other Philadelphia banks with which the merging banks must compete. Girard Trust, for example, presently has a total of 50 offices, which cover all sections of Philadephia and its suburbs. According to Girard's 1965 annual report, "Close to two-thirds of all our deposits are now serviced at branch locations." It thus appears that Girard is handling a higher percentage of its deposits at its branches than is either Central-Penn or Provident.

Quite apart from a narrow consideration of the branching systems of the merging banks, the competitive structure is properly evaluated only when all the financial institutions which are competing for the sav-

ings and deposit dollars and the business, real estate, and personal loans are taken into consideration. It has already been shown that all of these financial institutions represent an impressive multiplicity of competitive units and resources. While figures are not available for the resources of all competing financial institutions, the figures that are available indicate that the premerger relative size of Provident is 3.93% of total financial institution resources and of Central-Penn is 2.09%. The post-merger relative size of the resulting bank will be 6.02%.[3] This post-merger relative size, while overstated because of lack of data from some competitors, will not cause, by any reasonable measure, a significant lessening of competition in the resulting bank's market.

This merger, on the contrary, will stimulate competition among the largest banks in the market area. As the Federal Reserve Board said in its decision on the Fidelity Philadelphia-Liberty Real Estate Bank merger in 1963, "the climate of competition would be stimulated by the increased capacity of a large scale bank, and the range of choices available to customers who require services which can only be rendered by a larger bank would be increased." [4]

We have shown that the competition which would be eliminated by this merger is minuscule. It is now pertinent to examine the procompetitive effect of the merger on the convenience and needs of the Philadelphia market.

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[3] These relative size figures are based on the aggregate resources figures of the following financial institutions: mutual savings banks, \$2.861 billion; savings and loan associations, \$2.555 billion; insurance companies, \$3.847 billion; and commercial banks, \$8.495 billion. Provident has total resources of \$698.697 million and Central-Penn has resources of \$370.379 million.

The increased lending capacity of the resulting bank will benefit large banking customers through the creation of an additional source of very large loans. The close relationship between competition and convenience and needs of the community is thus demonstrated. The needs of these large customers are better met through the injection of added competition in the large loan market.

The combining of the computer systems of the applicant banks will yield a more efficient data processing operation. Provident, at present, has new data processing equipment on order to replace its present obsolescent equipment. These new computers will adequately take care of business in the foreseeable future. Central-Penn's computers have no backup capacity; this merger will solve the problem of this vulnerability. A direct access system, now being put into service by Central-Penn, will enable the resulting bank to provide direct access to its computers from customers sooner than Provident could on its own. With its greater financial resources and larger operations to assume acquisition and start-up costs, the resulting bank will be better able to provide the public with the latest advances in data processing services.

Use of the recently renovated Provident main office by the resulting bank will not only increase its efficiency but will improve customer service. Further, it will eliminate the necessity of a substantial outlay by Central-Penn to obtain adequate headquarters. To do so, according to Central-Penn's preliminary estimate, its annual occupancy costs would increase $250,000.

Since it has been shown that the branch systems of the merging banks are complementary, that an adequate number of alternative sources of financial

services exist in the Philadelphia area and that competition among the large financial institutions will be stimulated, it is concluded that this merger, rather than having an overall adverse effect on competition, will have a favorable effect. Further, the increased ability of the resulting bank to serve the convenience and needs of the Philadelphia area by increased efficiency, by a greater lending capacity, through more adequate banking quarters, and by a generally improved quality of banking services makes this merger desirable. We would be hindering the economic growth of Philadelphia if we failed to give our approval to this merger application.

Pursuant to the 1966 Amendment to the Bank Merger Act, we find that the merger of Provident National Bank and Central-Penn National Bank clearly conforms to the statutory criteria and is in the public interest. The application is, therefore, approved.

James J. Saxon,
Comptroller of the Currency.

Dated:

APPENDIX D

United States District Court, Eastern District of Pennsylvania

60-111-1003, Civil Action No. 40032,
Filed: Apr. 1, 1966

UNITED STATES OF AMERICA, PLAINTIFF

v.

PROVIDENT NATIONAL BANK, AND CENTRAL-PENN NATIONAL BANK OF PHILADELPHIA, DEFENDANTS

COMPLAINT

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action to obtain equitable relief against the above-named defendants and complains and alleges as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed and this action is instituted against the above-named defendants under Section 15 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 736, as amended, entitled "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes," commonly known as the Clayton Act, in order to prevent and restrain continued violations by the defendants, as hereinafter alleged, of Section 7 of the Clayton Act, 38 Stat. 731, as amended by the Act of Congress of December 29, 1950, c. 1184, 64 Stat. 1125.

No significant competition exists among any of the other branch offices of the applicant banks, although a few of these are relatively close to each other.

Offices of the two applicant banks located in downtown Philadelphia at 17th and Arch Streets, and at 17th and Chestnut Streets are separated by three long blocks traversing Penn Center, an office redevelopment area. Within .3 of a mile from Provident's office are nine commercial banks, three savings banks, twelve savings and loan associations, five finance and small loan companies, and one credit union. Central-Penn's office is within .3 of a mile of six commercial banks, three savings banks, one savings and loan association, four finance and small loan companies, three credit unions, and two insurance companies.

Other branch offices of the applicants in downtown Philadelphia, which are located in the same area, are those at 7th and Chestnut Streets and at 4th and Chestnut Streets. All the major banks are represented in this section. Within .3 of a mile from Central-Penn's office located at 7th and Chestnut Streets are three commercial banks, a savings bank, three savings and loan associations, three finance and small loan companies, two credit unions, and nine insurance companies. Provident's office located at 4th and Chestnut Streets is within .3 of a mile of seven commercial banks, three savings and loan associations, one finance and small loan company, two credit unions, and one insurance company.

The office of Central-Penn, located at 2nd and Pine Streets, is seven blocks away, and separated by the Independence National Historical Park, from Provident's office located at 4th and Chestnut Streets. No competition exists between the two offices because of the distance, difference in neighborhood and the barrier created by the park. The draw area of the 2nd

and Pine office is principally South Philadelphia rather than downtown Philadelphia. Within a mile from Central-Penn's office are three commercial banks, a savings and loan association, and one finance and small loan company.

In heavily populated West Philadelphia, Central-Penn's office at 58th Street and Baltimore Avenue and Provident's office at 19 South 52nd Street are 1.5 miles apart and thus have separate service areas. Within one mile of Central-Penn's office are three commercial banks, one savings and loan association, and two finance and small loan companies. Provident's office is within 1.3 miles of three commercial banks, two savings banks, five savings and loan associations, seven finance and small loan companies, four credit unions, and one insurance company.

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In Delaware County, the office of Central-Penn located at 301 Baltimore Pike, Springfield, and the office of Provident at Hart Lane and Saxer Avenue, Springfield, are approximately 1.2 miles apart. Within one mile from Central-Penn's office are four commercial banks, two savings and loan associations, two finance and small loan companies, and a savings bank. Provident's Springfield office is within 2.2 miles of six commercial banks, two savings banks, two savings and loan associations, four finance and small loan companies, and two credit unions.

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miles apart. They are separated by the Pennsylvania Turnpike. Because of limited overpasses and underpasses, these offices are about 2.8 miles apart by either the eastern or western route. Driving this distance during rush hours can take from fifteen minutes to half an hour. Central-Penn's Industrial Park office cannot adequately serve the population drawn to the stores in the shopping center. Provident's office is within 1.75 miles of four commercial banks and two savings banks, and within .5 of a mile of a savings and loan association, and two finance and small loan companies.

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ings and deposit dollars and the business, real estate, and personal loans are taken into consideration. It has already been shown that all of these financial institutions represent an impressive multiplicity of competitive units and resources. While figures are not available for the resources of all competing financial institutions, the figures that are available indicate that the premerger relative size of Provident is 3.93% of total financial institution resources and of Central-Penn is 2.09%. The post-merger relative size of the resulting bank will be 6.02%.[a] This post-merger relative size, while overstated because of lack of data from some competitors, will not cause, by any reasonable measure, a significant lessening of competition in the resulting bank's market.

This merger, on the contrary, will stimulate competition among the largest banks in the market area. As the Federal Reserve Board said in its decision on the Fidelity Philadelphia-Liberty Real Estate Bank merger in 1963, "the climate of competition would be stimulated by the increased capacity of a large scale bank, and the range of choices available to customers who require services which can only be rendered by a larger bank would be increased."

We have shown that the competition which would be eliminated by this merger is minuscule. It is now pertinent to examine the procompetitive effect of the merger on the convenience and needs of the Philadelphia market.

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[a] These relative size figures are based on the aggregate resources figures of the following financial institutions: mutual savings banks, $2.861 billion; savings and loan associations, $2.555 billion; insurance companies, $3.847 billion; and commercial banks, $8.495 billion. Provident has total resources of $698.697 million and Central-Penn has resources of $370.379 million.

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The combining of the computer systems of the applicant banks will yield a more efficient data processing operation. Provident, at present, has new data processing equipment on order to replace its present obsolescent equipment. These new computers will adequately take care of business in the foreseeable future. Central-Penn's computers have no backup capacity; this merger will solve the problem of this vulnerability. A direct access system, now being put into service by Central-Penn, will enable the resulting bank to provide direct access to its computers from customers sooner than Provident could on its own. With its greater financial resources and larger operations to assume acquisition and start-up costs, the resulting bank will be better able to provide the public with the latest advances in data processing services.

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Since it has been shown that the branch systems of the merging banks are complementary, that an adequate number of alternative sources of financial

services exist in the Philadelphia area and that competition among the large financial institutions will be stimulated, it is concluded that this merger, rather than having an overall adverse effect on competition, will have a favorable effect. Further, the increased ability of the resulting bank to serve the convenience and needs of the Philadelphia area by increased efficiency, by a greater lending capacity, through more adequate banking quarters, and by a generally improved quality of banking services makes this merger desirable. We would be hindering the economic growth of Philadelphia if we failed to give our approval to this merger application.

Pursuant to the 1966 Amendment to the Bank Merger Act, we find that the merger of Provident National Bank and Central-Penn National Bank clearly conforms to the statutory criteria and is in the public interest. The application is, therefore, approved.

JAMES J. SAXON,
Comptroller of the Currency.

DATED:

APPENDIX D

United States District Court, Eastern District of Pennsylvania

60-111-1003, Civil Action No. 40032, Filed: Apr. 1, 1966

UNITED STATES OF AMERICA, PLAINTIFF

v.

PROVIDENT NATIONAL BANK, AND CENTRAL-PENN NATIONAL BANK OF PHILADELPHIA, DEFENDANTS

COMPLAINT

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action to obtain equitable relief against the above-named defendants and complains and alleges as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed and this action is instituted against the above-named defendants under Section 15 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 736, as amended, entitled "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes," commonly known as the Clayton Act, in order to prevent and restrain continued violations by the defendants, as hereinafter alleged, of Section 7 of the Clayton Act, 38 Stat. 731, as amended by the Act of Congress of December 29, 1950, c. 1184, 64 Stat. 1125.

2. Each of the defendants has its principal place of business, transacts business, and is found within the Eastern District of Pennsylvania.

II

The Defendants

3. Provident National Bank, hereinafter referred to as "Provident," is made a defendant herein. It is a banking association organized under the laws of the United States, having its principal place of business at Philadelphia, Pennsylvania.

4. Central-Penn National Bank of Philadelphia, hereinafter referred to as "Central-Penn," is made a defendant herein. It is a banking association organized under the laws of the United States, having its principal place of business at Philadelphia, Pennsylvania.

III

Trade and Commerce

5. Commercial banks fill an essential and unique role in the nation's economy. Most money payments are made through the device of demand deposits, a function unique to commercial banks. Through the making of loans to individual and business borrowers commercial banks supply a significant part of the credit requirements of our economy. Commercial banks also accept time deposits from various types of depositors and provide a wide variety of other financial services, including personal and corporate trust accounts, the collection of drafts, bills, and other commercial instruments; the acceptance of bills of exchange; the issuance of letters of credit; the sale of cashiers' checks, and drafts on correspondent banks; the purchase or sale of securities for customers; the

sale of foreign exchange; and the renting of safety deposit boxes. This combination of services is unduplicated by other financial institutions.

6. Commercial banks, because of the importance of bank credit to business borrowers and their close relationships with many such borrowers, and because of their holdings of stock in trust accounts, have an important influence on competition in all branches of industry and commerce served by the banking system.

7. The history of commercial banking in the four-county area of Philadephia, Bucks, Delaware and Montgomery counties has been one of consolidations, mergers, and acquisitions. This has resulted in a heavy concentration of the business of commercial banking within a relatively few banks. As of June 30, 1965 the five largest commercial banks within the aforementioned four-county area controlled approximately 73% of the total assets, 74% of the total loans, 71% of the total deposits of individuals, partnerships and corporations (IPC deposits), 72% of the total IPC demand deposits and 54% of all banking offices of 37 commercial banks doing business in the area.

8. As of June 30, 1965, Provident, the fifth largest commercial bank in the four-county area, controlled approximately $683 million (9%) of the total assets, $398 million (9%) of the total loans, $475 million (9%) of the total IPC deposits, $326 million (10%) of the total IPC demand deposits and 32 (9%) of the banking offices of the 37 banks doing business in the four-county area.

9. As of June 30, 1965, Central-Penn, the sixth largest commercial bank in the four-county area, controlled approximately $369 million (5%) of the total assets, $210 million (5%) of the total loans, $263 million (5%) of the total IPC deposits, $170 million

(5%) of the total IPC demand deposits and 24 (6%) of the banking offices of the 37 banks doing business in the four-county area.

10. Both Provident and Central-Penn have made numerous acquisitions which have contributed to the present degree of commercial banking concentration in the four-county area. Provident is the product of seven such mergers or consolidations since 1947. Central-Penn has acquired six banks since 1949.

11. After the proposed merger of Provident and Central-Penn, the resulting bank would become the fourth largest bank in the area. It would control approximately 14% of the total assets, 14% of the total loans, 14% of the total IPC deposits, 15% of the total IPC demand deposits and 15% of the banking offices of the 36 banks doing business in the four-county area.

12. After the proposed merger, the five largest banks in the area would control approximately 78% of the total assets, 79% of the total loans, 76% of the total IPC deposits, 77% of the total IPC demand deposits and 63% of the banking offices of 36 banks doing business in the area.

13. Provident and Central-Penn compete with each other and with other commercial banks in the four-county area in the performing of commercial banking functions, as described in paragraph 5 above.

14. Customers of Provident and Central-Penn have regularly utilized interstate communications, including the mails, telephone and telegraph, to effect deposits, apply for and obtain loans and obtain other services made available by these banks. The banks have regularly utilized interstate communications, including the mails, telephone and telegraph, to conduct banking business with customers, and with other

banks located in states other than the state in which they are located. The banks have also received a significant amount of deposits from states other than the state in which they are located, and have made a significant amount of loans to customers in such other states. Provident and Central-Penn are engaged in interstate commerce.

IV

OFFENSE CHARGED

15. Defendants Provident and Central-Penn have entered into an agreement to merge Provident into Central-Penn, under the Charter and Articles of Association of Central-Penn. The agreement was approved by their respective boards of directors on or about November 10, 1965.

16. The effect of the merger of Provident and Central-Penn, pursuant to the agreement described in paragraph 15 above, may be substantially to lessen competition or to tend to create a monopoly in violation of Section 7 of the Clayton Act.

17. The offense alleged in this complaint is continuing and will continue unless the relief hereinafter prayed for is granted.

V

EFFECTS

18. The aforesaid offense charged in this complaint, if continued and carried out, will have, among others, the following effects:

(a) competition between the defendants will be permanently eliminated;

(b) competition generally in commercial banking in the four-county area of Philadel-

phia, Bucks, Delaware and Montgomery counties will be substantially and unreasonably lessened;

(c) concentration in commercial banking in the four-county area will be substantially and unreasonably increased.

Prayer

WHEREFORE, plaintiff prays:

1. That the aforesaid agreement between defendants Provident and Central-Penn be adjudged and decreed to be unlawful, in violation of Section 7 of the Clayton Act.

2. That defendants Provident and Central-Penn and all persons acting on their behalf be enjoined from carrying out the agreement of merger or any similar plan or agreement the effect of which would be to merge or consolidate said defendants.

3. That plaintiff have such other and further relief as the Court may deem just and proper.

4. That plaintiff recover the costs of this suit.

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Attorneys, Department of Justice.

NICHOLAS DEB. KATZENBACH,
Attorney General.

DONALD F. TURNER,
Assistant Attorney General.

DONALD F. MELCHIOR,
Attorney, Department of Justice.

DONALD G. BALTHIS,
Attorney, Department of Justice.

DREW J. T. O'KEEFE,
United States Attorney.

Affidavit

District of Columbia,
WASHINGTON, D.C., ss:

John W. Neville, being duly sworn, deposes and says that he is an attorney employed by the Antitrust Division of the Department of Justice; that he has been actively engaged in the preparation of this action; that he has read the foregoing Complaint and knows the contents and is familiar with the subject matter thereof; that he is informed and believes that the allegations of fact contained therein are true; and that the sources of his information are written statements made by the defendants in their Application to the Comptroller of the Currency for approval to merge and information obtained from recognized trade sources.

John W. Neville,
Attorney, Department of Justice.

Subscribed and sworn to before me this 31 day of March, 1966.

Sara B. McGranm,
Notary Public.

My Commission Expires May 1, 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1967

No. 914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

UNITED STATES OF AMERICA,
Appellant,

v.

FIRST CITY NATIONAL BANK OF HOUSTON, SOUTHERN NATIONAL BANK OF HOUSTON, AND WILLIAM B. CAMP, Acting Comptroller of the Currency,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

MOTION TO AFFIRM

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, Appellees First City National Bank of Houston and Southern National Bank of Houston move to affirm the judgment below on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

STATEMENT

First City National Bank of Houston (First City) and Southern National Bank of Houston (Southern), pursuant to the Bank Merger Act of 1966, 12 U.S.C. § 1828(c), filed an application with the Comptroller of the Currency of the United States (Comptroller) for permission to merge. In accordance with the Bank Merger Act of 1966, the Comp-

troller considered the extensive evidence of First City and Southern in support of their application, requested and considered opinions of the Federal Reserve Board, the Federal Deposit Insurance Corporation and the Department of Justice, made appropriate findings of fact, and approved the merger on September 20, 1966, determining that (1) the effect upon competition of the proposed merger would be minimal and insubstantial and (2) in any event, any anticompetitive effects of the proposed merger would be clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

The Department of Justice (Department) filed suit under Section 7 of the Clayton Act, 15 U.S.C. § 26, seeking to enjoin the merger. The Department's complaint made no reference to the Bank Merger Act of 1966 and did not contain factual allegations sufficient to serve as a basis for demonstrating a violation of that Act. The court below, on motion of the Comptroller of the Currency, dismissed the suit on the pleadings because of the Department's failure to allege facts sufficient to demonstrate a violation of the controlling statute, the Bank Merger Act of 1966.. The court concluded that in order to properly allege a violation of the Act, the Department is required to plead that the anticompetitive effects of the proposed merger are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. Reluctant to dismiss on the pleadings, the trial court allowed the Department ten (10) days to amend its complaint, indicating it would be willing to extend more time if necessary.

The Department was then free to amend and proceed to trial on the merits without making any binding admission as to the burden of pleading, pleading in the alternative if

it wished. Fed. R. Civ. P. 8(e)(2). This would have permitted the instant case and all questions of construction of the Bank Merger Act to be disposed of in one trial and in one appeal. However, the Department has chosen to bring this case before the Court in piecemeal fashion on a bare pleading question and to stand adamantly on a complaint based solely on Section 7 of the Clayton Act despite six decisions of district courts to the contrary in the past ninety days.[1]

QUESTION PRESENTED

The trial court's order of dismissal presents merely the question of what the Department is required to allege in its complaint. The questions of burden of proof or of going forward, which, of course, can be independent of the burden of pleading, and of the weight to be given to the Comptroller's decision, were not before the trial court at the pleading stage.

Insofar as the Department would have this Court consider the question presented to contain the questions of where the burden of going forward and burden of proof lie and what the nature of review is, it is in error. The question may be properly stated as follows:

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[1] The instant case and: United States v. Mercantile Trust Co., 1966 Trade Reg. Rep. ¶.... (E. D. Mo. Dec. 19, 1966) (Dismissed on Pleadings); United States v. Third National Bank of Nashville, 1966 Trade Reg. Rep. ¶71,934 (M. D. Tenn.) (Trial on Merits); United States v. Provident National Bank, 1966 Trade Reg. Rep. ¶71,931 (E. D. Pa.) (Holding in denying motion to dismiss); United States v. Crocker-Anglo National Bank, 1966 Trade Reg. Rep. ¶71,898 (D. C. Cal.) (Decision remanding cause to Comptroller); United States v. First National Bank of Hawaii, Civ. No. 2540, D. Hawaii 1966 (Oral Opinion of October 31, 1966, Transcript pp. 91-94) (Holding on denial of motion to dismiss.)

Whether the Bank Merger Act of 1966 requires the Department of Justice in an antitrust suit seeking to enjoin a bank merger to allege in its complaint sufficient facts to invoke the standards set forth in such Act including an allegation that the merger's anticompetitive effects are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

THE QUESTIONS ON WHICH THE DECISION OF THE COURT DEPENDS ARE UNSUBSTANTIAL

The only action of the trial court before this Court for review is its judgment granting the Comptroller's motion to dismiss. The Comptroller's motion was predicated on the premise that the complaint failed "to state facts sufficient to support a cause of action." The decision of the trial court was based on the pleadings before it. Its holding was simply that the Department is required to plead that the anticompetitive effects of the proposed merger are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

It is clear that while the burden of pleading and the burden of proof usually correspond, they do not necessarily do so. *Palmer* v. *Hoffman*, 318 U.S. 109, 117 (1943); Clark on Code Pleading § 96, at 610 (2d ed. 1947); Annot., 130 A.L.R. 440, 480 (1941). Thus, a court by dismissing a complaint for defective pleading does not thereby decide the burden of proof. It remained open for the Department to argue on trial of the case that the burden of proof on this question should properly be placed upon the defendants and that no weight is to be given to the Comptroller's determinations on this and other issues.

The trial court had no opportunity to determine the questions of burden of proof and the weight to be given the Comptroller's decision in the proper and illuminating context of a trial on the merits. Fundamental to our system is the avoidance of abstract and advisory decisions. We submit that under our principles of procedure and judicial administration only one question can properly be considered to be before this Court: Can the Department base its suit solely on Section 7 of the Clayton Act or is it required to plead under the Bank Merger Act of 1966 that the anticompetitive effects of a proposed merger are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served? It is manifest that the trial court was correct in requiring the Department to so plead.

The Burden of Pleading Is Clearly Placed On the Department of Justice by The Bank Merger Act of 1966.

Both the structure of the Bank Merger Act of 1966 and its legislative history make clear that the Department has the burden of pleading that the anticompetitive effects of a challenged merger are not clearly outweighed in the public interest. The statutory standards defining a violation of the Act are contained in one general clause with a basic exception contained as an intrinsic part of that same clause. The Act provides that a responsible agency shall not approve:

> any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the

> public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

It explicitly requires courts to apply an identical standard in reviewing an agency approval. See Section 7(B) of the Bank Merger Act of 1966, 12 U.S.C. § 1828(c)(7)(B). The appropriate and controlling principle for statutes containing exceptions within a general clause defining an offense was long ago stated by this Court in *United States* v. *Cook*, 84 U.S. 168, 173 (1872):

> Where a statute defining an offence contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offence that the ingredients of the offence cannot be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the accused is not within the exception, but if the language of the section defining the offence is so entirely separable from the exception that the ingredients constituting the offence may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference, as the matter contained in the exception is matter of defence and must be shown by the accused.

Accord, *Seese* v. *Bethlehem Steel Co.,* 74 F. Supp. 412, 416 (D. Md. 1947), *aff'd,* 168 F. 2d 58 (4th Cir. 1948). See Annot., "Burden of allegation and proof in civil causes as regards exception in statute", 130 A.L.R. 440 (1941); Annot., "Burden of averment and proof as to exception in criminal statute on which the prosecution is based", 153 A.L.R. 1218 (1944).

Consideration of the public interest is so incorporated with the language defining a violation of the Bank Merger Act of 1966 that the standards for what constitutes a viola-

tion of the Act cannot be adequately defined without reference to the public interest factor.

The bulk of the Department's argument does not go to the question of the burden of pleading but rather to the questions of the burden of proof and the extent of proof and thus is not germane to the questions presented to this Court. The one argument that the Department seeks to make on the actual pleading question is based on the structure of the statute. It contends that where a party relies on a statute containing a general clause followed by an exception or proviso in a subsequent substantive clause, such exception is a matter of defense and need not be negatived. This is a misleading oversimplification and is inapplicable. The Bank Merger Act of 1966 is not a statute containing a general clause with an exception contained in a subsequent substantive clause of the statute. As demonstrated, the standards are contained in one general clause, and the exception is contained as an intrinsic part of that same clause.[2]

The legislative history of the Bank Merger Act of 1966 is clouded by conflicts in the strongly partisan positions

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[2] *United States* v. *King & Howe*, 78 F. 2d 693 (2d cir. 1935), upon which the Department relies, is in accord with the general rule that where an exception is not a part of the general clause, but is contained in a subsequent provision of the statute, the exception need not be plead by the party relying on the general clause of the statute. Annot., 130 A.L.R. 440, 443 (1941). The case concerned Section 7 of the Food and Drug Act, 21 U.S.C. §8, which contains a general clause followed in subsequent provisions of the statute by an exception, 78 F.2d at 695. However, the regulations based on that section of the statute contained the exception within the general clause. 78 F.2d at 696. The Second Circuit concluded that the wording of the regulations could not alter the nature of the proviso contained in the statute and thereby change the rule of pleading. 78 F.2d at 696. The implication is clear that had the statute contained the exception within the general clause, as did the applicable regulations, the Department would have been required to negate the exception in its pleadings in accordance with long-standing general principles. See *United States* v. *Cook*, 84 U.S. 168, 174 (1872). Annot., 130 A.L.R. 440, 441 (1941).

taken by the bill's proponents and opponents as to its proper interpretation. On one point, however, there is no controversy. The bill was designed to eliminate the conflict caused by the variance in standards applied in evaluating bank mergers by the Department of Justice and the various banking administrative agencies. As the House Committee on Banking and Currency stated:

> "The bill would establish a single set of standards for the consideration of future mergers by the banking supervisory agencies, the Department of Justice and the courts under the antitrust laws — standards stricter than those in the Bank Merger Act [of 1960], but which include both the effect of the merger on competition and the convenience and needs of the community to be served. . . ." H. R. Rep. No. 1221, 89th Cong., 2d Sess. 1 (1966).

Congressman Patman, Chairman of the House Committee on Banking and Currency, upon whose understanding of the Act the Department has heavily relied, summarized this purpose succinctly:[8]

> "The major purpose of this bill is to provide a single standard for the approval and adjudication of bank mergers prior to their consummation . . . Under the Bank Merger Act of 1960 the bank supervisory agencies approved bank mergers on the basis of one standard and the Justice Department was free to attack these same mergers under the Sherman and Clayton Antitrust Acts. The Supreme Court of the United States in the Philadelphia National Bank case in June of

[8] Many other congressmen can be cited on this point. See, *e.g.*, 112 Cong. Rec. (Daily ed.) 2333 (Congressman Smith, Va.); 112 Cong. Rec. (Daily ed.) 2336 (Congressman Multer); 112 Cong. Rec. (Daily ed.) 2337 (Congressman Brock); 112 Cong. Rec. (Daily ed.) 2339 (Congressman Ashley); 112 Cong. Rec. (Daily ed.) 2343 (Congressman Stanton); 112 Cong. Rec. (Daily ed.) 2355 (Congressman Grabowski). The sense of the Senate was the same. 112 Cong. Rec. (Daily ed.) 2538 (Senator Robertson); 112 Cong. Rec. (Daily ed.) 2545 (Senator Hart).

> 1963 held that the Bank Merger Act of 1960 did not preclude the application of the antitrust laws to bank mergers. The banking agencies and the courts continued to act under distinct statutory authority. A majority of your committee felt that the law should provide a single standard to be applied by the agencies and the courts alike.
>
> "This is exactly what this bill does. The single standard that the bill establishes is found in paragraph 5(b) . . ." 112 Cong. Rec. (Daily ed.) 2333.

In view of the plain meaning of the statute, which is clearly reinforced by the legislative history, banks contemplating merger now should be able to do so with the assurance that their application will not be evaluated by one set of standards by the banking agencies and then attacked on the basis of another set of standards by the Department of Justice.

This paramount statutory purpose of requiring the banking agencies, the Department of Justice, and the courts to apply a single set of standards in evaluating bank mergers requires that the burden of pleading the anticompetitive effects of the proposed transaction are not clearly outweighed in the public interest be placed upon the Department of Justice. The Department's position that it is entitled to evaluate a merger and file a lawsuit without being required to plead that the anticompetitive effects of the transaction are not clearly outweighed in the public interest would thwart the Congressional purpose. Mergers which were manifestly legal under the Bank Merger Act of 1966 could be approved by administrative agencies on the ground that the anticompetitive effects of the transaction were clearly outweighed in the public interest and subsequently attacked by the Department of Justice on the basis of another set of standards. This pleading question is peculiarly vital in an area where

the mere institution of a suit, with the resultant automatic statutory stay, can in itself frustrate a proposed merger. See, *e.g., United States* v. *First National Bank of State College*, 5 Trade Reg. Rep. 52,622 Cas. No. 1900 (D. Pa. 1966). (Banks withdrew application for approval to merge after complaint was filed.) Congress cannot have intended that a plaintiff become entitled to an automatic injunction without even having the burden of alleging all the facts necessary to demonstrate a violation of the controlling statute. The burden of pleading that the benefits of the transaction in the public interest do not clearly outweigh the anticompetitive effects gives the Department the duty of making the allegation in good faith, whether it has the burden of proof or not. Fed. R. Civ. P. 11; CLARK ON CODE PLEADING § 41, at 253 (2d ed. 1947).[4] This, of course, assures that the new statutory standards would be honored by the Department of Justice in its administration of its duties under the statute as Congress intended.

CONCLUSION

The Department of Justice, declining an opportunity to amend, elected to stand on its pleadings in order to test its theory of the Bank Merger Act of 1966. It thereby brought before this Court in piecemeal fashion a narrow pleading question. The public interest "exception" in the Bank Merger Act, which is the controlling statute in this

[4] After meeting this pleading burden, the Department is, of course, free to argue that the usual rule that the burden of pleading corresponds with the burden of proof should not be followed and that no weight is to be given the Comptroller's findings. This is in effect what occurred in *United States* v. *Provident National Bank*, E. D. Pa., No. 40032. The trial court did not dismiss on the pleadings, 1966 Trade Reg. Rep. ¶71,931. However, when the Department subsequently took the position that it would not meet the burden of proof which the court determined that it had, the court gave judgment to the defendants 1966 Trade Reg. Rep. ¶.......... (Opinion of December 29, 1966.)

case, is contained in the statute as an integral part of the general standard. The Department cannot allege grounds for equitable relief without pleading sufficient facts to bring it within the controlling statutory standard. Thus, the Department's pleadings manifestly are defective, and the district court properly dismissed them. The Department of Justice cannot in good conscience complain of the effect of an affirmance in choosing to stand on a pleading question. It placed the appellee banks in a position where they might well have to face multiple appeals, first on the pleadings and then on the merits, causing protracted delay which would be commercially unendurable for the appellees. The district court's order of dismissal, which became final only after the Department had refused the opportunity to amend, should be affirmed.

Wherefore, appellees pray that this motion to affirm be in all things granted and that the judgment of the district court be affirmed.

Respectfully submitted,

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January 6, 1966

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CITATIONS

In the Supreme Court of the United States

October Term, 1966

No. 914

United States of America, Appellant

v.

First City National Bank of Houston, Southern National Bank of Houston, and William B. Camp, Acting Comptroller of the Currency

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellees move that the judgment of the District Court be affirmed on the ground that the questions raised by appellant are so insubstantial as not to warrant further argument.

STATEMENT

Two banks may not merge without the prior consent of the appropriate bank supervisory agency.[1]

[1] The Comptroller of the Currency when the resulting bank is to be national; the Federal Reserve Board when the resulting bank is to be state chartered but a member of the Fed-

Under the Bank Merger Act of 1966[2] (BMA-66), such consent is to be withheld if the proposed merger violates enumerated antitrust standards unless such considerations are outweighed by the needs of the community to be served. If these precepts are complied with, no antitrust suit may be filed challenging the merger unless bottomed on a monopolization. If the Department of Justice believes that the proposed merger did not meet these BMA standards, then it may institute a suit for court review of that issue.[3]

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eral Reserve System; and the Federal Deposit Insurance Corporation when the resulting bank is to be state chartered; not a member of FRS but is insured by the Corporation. (Except that the Corporation is the appropriate agency in every case where one of the parties is an uninsured institution.) This encompasses the overwhelming majority (97%) of all banks and trust companies.

[2] 12 U.S.C. 1828(c), as amended, February 21, 1966.

[3] BMA-66, § 5(B); 7(A)-(C); 2(c)

(5) The responsible agency shall not approve—

(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

(7)(A) Any action brought under the antitrust laws arising out of a merger transaction shall be commenced prior to the earliest time under paragraph (6) at which a merger transaction approved under paragraph (5) might be consummated. The commencement of such an action shall stay the effectiveness of the agency's approval unless the court shall otherwise specifically order. In any such action, the court shall review de novo the issues presented.

(B) In any judicial proceeding attacking a merger transaction approved under paragraph (5) on the ground that the

The proposed merger of defendant banks herein was approved by the Comptroller after a finding that no substantial anticompetitive effects would follow the merger but that the extensive benefits which the merger would afford to the Houston metropolitan area should, in any event, prevail. Thereupon, the Department of Justice instituted this action alleging a violation of the standards, not of BMA-66, but of Section 7 of the Clayton Act. The Comptroller consequently moved to dismiss. The Court below, reluctant to dispose of any important case on the pleading, provided plaintiff with an opportunity to amend. It declined.

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merger transaction alone and of itself constituted a violation of any antitrust laws other than section 2 of the Sherman Antitrust Act, 15 U.S.C. 2), the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5).

(C) Upon the consummation of a merger transaction in compliance with this subsection and after the termination of any antitrust litigation commenced within the period prescribed in this paragraph, or upon the termination of such period if no such litigation is commenced therein, the transaction may not thereafter be attacked in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2), but nothing in this subsection shall exempt any bank resulting from a merger transaction from complying with the antitrust laws after the consummation of such transaction.

Sec. 2(c) Any court having pending before it on or after the date of enactment of this Act any litigation initiated under the antitrust laws by the Attorney General after June 16, 1963, with respect to the merger, consolidation, acquisition of assets, or assumption of liabilities of an insured bank consummated after June 16, 1963, shall apply the substantive rule of law set forth in section 18(c)(5) of the Federal Deposit Insurance Act, as amended by this Act.

Thus we believe a more accurate framing of the question presented by appellant's jurisdictional statement may be derived from its recitation of contentions in its argument below:

> Section 7 of the Clayton Act is still applicable to bank mergers; it has not been replaced or repealed by the Bank Merger Act of 1966, and plaintiff is not required to plead or prove a violation of the Bank Merger Act.[4]

What appellant poses as the question here[5] is merely one of a series of related subsidiary issues, the answers to which may be derived from this principal inquiry. This root question has been answered adversely to plaintiff's position by a special three-judge Court in San Francisco and by five Chief Judges in as many districts who have considered the statute in six separate cases.[6]

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[4] Page 7, brief in opposition to the motion to dismiss.

[5] "Whether the Bank Merger Act of 1966 requires the government in an antitrust suit challenging a bank merger to establish not only that the merger may substantially lessen competition but also that its anticompetitive effects are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." (Jurisdictional Statement, page 2).

[6] *United States* v. *Mercantile Trust Company*, et al., E.D. Mo., No. 65 C 241(1) (St. Louis); *United States* v. *Provident National Bank*, *et al.*, E.D. Pa., No. 40032 (Philadelphia); *United States* v. *Third National Bank of Nashville*, *et al.*, M.D. Tenn., No. 3849 (Nashville); *United States* v. *Crocker-Anglo National Bank*, *et al.*, N.D. Cal., No. 41808 (San Francisco); *United States* v. *First National Bank of Hawaii*, *et al.*, D. Hawaii, No. 2540 (Hawaii).

ARGUMENT

Appellant persists in its contention that Clayton § 7 remains unaffected despite the plain language of BMA-66, arguing that:

1. *BMA-66 is a congressional recognition of the broader horizons of the failing company doctrine which this Court recognized in the Philadelphia National Bank case;*
2. *"Review de novo", inserted at the request of appellant, does not mean a review of the handling by the regulatory agency of the issues presented to and considered by it; rather it is not a review at all, but instead a trial de novo "free of presumptions traceable to anyone."*[1]
3. *The convenience and needs test is an exception to a statutory injunction which therefore need not be negatived. Further, this sort of information is more readily available to defendants who should logically be required to advance it.*

1. FAILING COMPANY DOCTRINE

Appellant suggests that the *real* purpose of the 1966 Bank Merger Act was to make sure that banks in financial straits could be merged into safer institutions without fear of running afoul of the antitrust laws. This, it proposes, is the substance of the phrase "convenience and needs" of the community.

The failing company doctrine is well recognized in antitrust law. Its broader application to banking cases was carefully noted in *Philadelphia Bank.*

[1] Pre-Trial Brief, *U.S.* v. *Provident National Bank, et al.,* p. 28.

Section 7 does not mandate cutthroat competition in the banking industry, and does not exclude defenses based on dangers to liquidity or solvency, if to correct them a merger is necessary.*

* Thus, arguably, the so-called failing company defenses, * * * might have somewhat larger contours as applied to bank mergers because of the greater public impact of a bank failure compared with ordinary business failures.[8]

But if the whole court could subscribe to this notion (and the dissent did so by implication) what valid purpose would be served by solemnly enacting a judicially recognized—and indeed unopposed—principle? We may not assume that Congress legislates to no purpose.

Plaintiff's argument is without merit.

The Court in *Crocker* categorically rejected this contention:

> "[T]he language * * * from Seaboard * * * would seem to make negative another argument of the Government * * * that * * * 'convenience and needs of the community to be served' is but a reiteration of the 'failing company doctrine' long recognized as 'an integral part of settled antitrust law.' No such limiting suggestion was ever made in the Seaboard Air Line case and the other cases dealing with the same statute. In our view it would be absurd to find that the new standards, so carefully framed for the 1966 Bank Merger Act were no more than the inclusion of a wholly unnecessary reference

[8] *United States* v. *Philadelphia National Bank*, 374 U.S. 361, at pp. 371–2 (1963).

to the 'failing company doctrine.' There is not the slightest indication in the language of the Act, or in its legislative history, to support the Government's effort thus to cancel or dissipate the declared purpose of the Act." (pp. 20–21 Slip Opinion 10/6/1966)

As did the court in *Nashville:*

> "The plaintiff's restrictive interpretation of the 1966 amendment finds little support either in legislative history or in the text of the amendment itself. On the contrary, both legislative history and the textual provisions of the amendment strongly indicate that it was the intent of Congress to effect substanial changes in existing antitrust law relative to bank mergers as enunciated in the Lexington and Philadelphia cases." (pp. 12–13 Slip Opinion 11/22/66)

Both Chief Judge Clary in *Provident* and Chief Judge Pence in *Hawaii* have specifically endorsed the opinion in *Crocker*.

2. THE MEANING OF "REVIEW DE NOVO"

Appellant contends that the term requires the court to ignore the findings of the banking agency and to assess the banking and competitive factors afresh. While such a construction might be compatible with the words "de novo" alone, it is hopelessly in conflict with the concept of a "review."

A review is inevitably in the nature of a re-examination of something and here the only thing which could be "reviewed" is the approval by the agency. Moreover, with specific reference to the "convenience and needs of the community to be served", serious con-

stitutional and practical problems attend the view advocated by Justice.

In *Philadelphia,* this Honorable Court indicated grave doubts concerning the competence of courts to deal with these questions as matters of first impression.

> We are clear, however, that a merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. *A value choice of such magnitude is beyond the ordinary limits of judicial competence,* and in any event has been made for us already, by Congress when it enacted the amended Section 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid. (Emphasis supplied.)[9]

Of course, this kind of judgment has, historically, been assigned by the Congress to the regulatory agencies. The court has had no qualms in evaluating the performance of these agencies in particular contexts, but always with the view that the agency's expertise is to be given at least *prima facie* and sometimes presumptive weight.[10]

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[9] *Supra,* p. 371.

[10] See, e.g., *National Broadcasting Co.* v. *United States,* 319 U.S. 190 (1943), *Board of Trade* v. *United States,* 314 U.S. 534 (1942), *FCC* v. *Pottsville Broadcasting Co.,* 309 U.S. 134; *Federal Radio Commission* v. *Nelson Brothers,* 289 U.S. 266, in which words of a rough comparability with "convenience and needs" are used approvingly. Certainly, as Congressman Reuss pointed out when queried about the phrase,

While a court might express some reservations concerning its competence on the question of what is a banking factor and how said factors serve the convenience and needs of the community, it has not felt itself constrained in assessing the weight to be accorded those factors once the banking agency has set them out and explained its reasoning.

Thus we believe that a "review *de novo*" simply means that the court will use the banking agency's findings as *prima facie* valid, but subject to revision should the court be convinced on its fresh examination that they are not supported by substantial evidence. With this view, the legislative history is in accord.

Senator Javits

> If the Department of Justice does its job and the courts ultimately apply this test de novo—in short, is it not implied clearly, from the right of regulatory agencies to go into court that the court will determine this issue, and I am sure, being influenced by what the regulatory agency decided but not being bound by it.

Senator Hart

> The Senator is correct.[11]

"They will require court interpretation" (C.R. 2/8/66, p. 2547) but as he pointed out—so did the broad language of the Sherman Act. "Convenience and needs" here encompass a careful evaluation of the spectrum of banking services offered or needed in the light of a community's economic development and requirements. See *Suburban Bank of Kansas City v. Jackson County State Bank*, 330 S.W. 2d 183 (Mo. 1959); *Chimney Rock National Bank of Houston v. State Bank Board*, 376 S.W. 2d 595 (Tex. 1964); *Wall v. Fenner*, 76 N.W. 2d 722 (S.D. 1956).

[11] Congressional Record, 2/9/66, p. 2548.

Senator Holland

> [The bill] will give greater weight to the finding of the regulating agency without making that final in the event some bad mistake is made.[12]

Contrary to its representation in the Jurisdictional Statement that it was the source of the term "review *de novo*", Justice had originally proposed that the statute should recite a "trial *de novo*" test. In his letter of September 24, 1965 to Representative Patman, Mr. Katzenbach had recommended court review of bank mergers by "trial *de novo* of all issues in any such suit."

The expression "review *de novo*" contained in the final bill was a result of the meetings among interested agencies requested by Representative Reuss on October 20, 1965. It was incorporated among Justice's proposals amendatory to the Ashley Bill on January 5, 1966.

Without any firm evidence as to the source of the term, we suggest that the attendant circumstances support the likelihood that the term "review *de novo*" was lifted from the opinion of the Fourth Circuit in the *Smithfield* case.[13] It will be recalled that Mr. Katzenbach had proposed "trial *de novo*" on September 24, 1965. The Ashley-Ottinger Bill was voted out on October 19, and Representative Reuss had proposed his substitute measure on October 20. *Smithfield* was decided October 21. The meetings referred

[12] *Id.* p. 2550.

[13] First National Bank of Smithfield, North Carolina v. Saxon, 352 F. 2d 267 (1965).

to above took place between that date and January 3, 1966.

Smithfield dealt, *inter alia*, with the question of the weight to be given the Comptroller's opinion granting a contested branch application. The Circuit Court remanded the case to the District Court noting that

> we will request the Court to review de novo the action of the Comptroller. (p. 273)

On the question of the difference between this phrase and the established "trial *de novo*", we believe that the distinction rested on the limited nature of the appellate review which the Circuit felt that the District Court was entitled to make

> If after the court has made its fact findings, it then appears that the decision of the Comptroller is dependent upon an exercise of discretion, the Court cannot substitute its discretion for the Comptroller's. However, it can set aside such a determination if, in the light of the facts found by the Court, it concludes that the Comptroller has abused, exceeded or arbitrarily applied his discretion. (p. 272)

This case and *Smithfield* involve different statutes. However, we need not pause to evaluate the distinctions. Clearly, the juxtaposition of events illumines the intent of Congress as to the meaning of "review *de novo*" as being something less than a clear slate and more approximating the presumptive validity Congress has traditionally accorded the judgment of a regulatory agency. The decision coming just before the adoption of identical language in legislation gives rise to the presumption in Sutherland that

legislative language will be interpreted on the assumption that the legislature was aware of * * * judicial decisions.[14]

Thus, while we need not reach the question whether *Smithfield* should govern us here, it does establish a definition of the meaning of the phrase "review *de novo*" which we may reasonably conclude was before the eye and within the intendment of the Congress when it adopted the term in BMA-66.

The court in *Crocker* found that the statutory scheme provided for a review of the competitive and convenience factors found by the regulatory agency. It held

> "No difficulty would be presented here so far as reviewing *de novo* the first of these determinations for this court has traditionally adjudged whether mergers have anti-competitive effects. But the problem of reviewing the second determination by the Comptroller, namely, whether the proposed transaction is outweighed in the public interest, and whether it meets the convenience and needs of the community, is plainly and unquestionably a legislative or administrative determination of a type which this court, as a constitutional court, is prohibited from deciding." (p. 12)
>
> * * * *
>
> "This does not mean that the administrative order of an agency or commission may not be reviewed in a judicial proceeding in a constitutional court; but such a review is necessarily limited to the determination if questions of law

[14] Sutherland, Statutory Construction, Section 4510, 3rd Edition, Horach.

and the ascertainment of whether findings of fact by the agency are supported by substantial evidence." (p. 14)

* * * * *

"It is plain to us that the congressional purpose here was to provide for an initial decision by the Comptroller and that the action brought by the Department of Justice should be deemed an action to review that decision. It is noteworthy that the section of the statute which uses the term 'de novo' does not speak of a trial de novo but of a *review* de novo.

The legislative scheme here, in our view, resembles that which is more elaborately spelled out in those sections of the Interstate Commerce Act which were discussed in the recent case of *Seaboard Air Line Co. v. United States*, 382 U.S. 154." (p. 19)

* * * * *

"In holding that our function now, under the 1966 Act, is to review an appropriate order of the Comptroller, we are disapproving other alternatives. One alternative would be to hold that we must disregard any suggestion for a review and simply decide the case on the evidence now before us, applying directly the standards set forth in Section 18(c)(5). Such, we think would not be consonant with the clear purpose and intent of the Act. Plainly the whole intent was that there should be made available in determining the validity of bank mergers the expertise of persons familiar with banking and with the operating procedures of banks. Not only is this court constitutionally without power to evaluate such features of the 'probable effect of the transaction in meeting the con-

venience and needs of the community to be served' but we lack the informed experience properly to apply such tests." (pp. 26–27)

In *Provident*, the court distinguished *Crocker* on the ground that no hearing had been held in the *Provident* case. Had there been a hearing, he would have found a substantial evidence rule; but lacking it, he found that the case fell within *Smithfield:*

> "The substantial evidence rule, therefore, may be invoked only when a proper foundation is laid for it as was done in Crocker.
>
> Therefore, the Court will hear all evidence in law and in fact, and if after it has made its findings, it then appears that the decision of the Comptroller is dependent on an exercise of discretion, the Court will bow to that discretion. However, if from the fact findings, it appears that the Comptroller abused, exceeded, or arbitrarily applied his discretion, the Court will set it aside."
>
> (See also slip opinion, 12/29/66, p. 5)

Chief Judge Miller, in *Nashville* specifically adopted the rationale of *Crocker* as to the scope and nature of the judicial review of the action of the regulatory agency. (P. 10, Slip Opinion).

3. "CONVENIENCE AND NEEDS" IS DEFENSIVE MATTER

As part of their "Application to Merge," national banks are required to file a substantial "Economic Brief" which is in large part devoted to a showing of the ways in which the proposed merger will serve the needs of the community. In addition, the opinion

of the Comptroller [15] sets out his findings on the convenience and needs factors.[16] Thus, any necessity for Justice to grope blindly for putative "conveinence and needs" factor is more theatrical than real. No one, of course, would preclude the court from enquiring into possible additional factors (Compare Fn 7a in the Jurisdictional Statement). This, however, raises questions of the *order* not the *burden* of proof.

The test for determining which party has the burden of establishing a case or issue is found in the result of an inquiry as to which party would be successful if no evidence at all were given, the burden being, of course, on the adverse party.[17] This rule was recently restated by Judge Yankwich in a 9th Circuit case:

> The question as to whether the burden of proof in its primary sense rests upon the plaintiff or defendant is ordinarily to be determined by ascertaining from the pleadings which of the parties without evidence would be compelled to submit to an adverse judgment before the introduction of any evidence.[18]

Let us assume, arguendo, in this case that plaintiff was to prove that, among financial institutions, in a

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[15] In this case, no opinion of the Comptroller was published until December 1, 1966. This was, however, some 19 days prior to appellant's decision not to assume the burden of negativing these factors.

[16] See in particular PP 14 and 22–25 of the Opinion dated 12/1/66.

[17] Corpus Juris Secundum, Evidence § 104.

[18] Pacific Portland Cement Company v. Food Machinery and Chemical Corp. C. A. Calif. 178 F. 2d 541, 547 (1949).

reasonably premised, adequate "section of the country" this merger would tend to substantially lessen competition and stop there. Could it prevail in the absence of further evidence from any party? We think clearly not.

The procedural scheme of BMA–66 contemplates that a proposed merger will be tested by the bank regulatory agency under the statutory criteria and if that agency finds the criteria have been met it will—only then—approve the proposal. Then, if Justice believes that the bank regulatory agency erred in applying these criteria, it may move the courts to review the decision of that regulatory agency. Thus, *ab initio,* Justice's suit must be premised on agency error. But since proof that competition might suffer is not proof that the agency erred (since the merger might still be properly approved), Justice is under the further constraint of proving that the statute was violated—i.e. that "convenience and needs" did not outweigh the anticompetitive effects. For lacking any evidence on the question, the presumption of regularity which attaches to the decisions of the regulatory agency would then require a dismissal of the complaint.

> The general presumption is that no official or person acting under an oath of office will do anything contrary to his official duty, or omit anything which his official duty requires to be done.[19]

This particular application is in accord with the general rule that the plaintiff has the burden of proof

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[19] Matter of Marcellus, 165 N.Y. 70, 75, 58 N.E. 796, 798.

as to all the elements of his claim or cause of action.[20] The faiure of the plaintiff to sustain such burden is fatal to his recovery.[21] The fact that the establishment of an affirmative case requires proof of a material negative allegation (anticompetitive effects not outweighed by convenience and needs);[22] such as that the case does not come within an exception provided for, does not save the party who makes such an allegation from the burden of pleading[23] and proving it.[24]

With this conclusion, the courts seem to be in uniform accord:

> It seems to be well settled that where the plaintiff in stating his cause of action must affirm a negative, he has the burden of providing the negative averment * * *. This rule applies alike to pleading statutes or contracts.[25]

The relevance of the locus of the burden to this appeal is this. A complaint has been filed, proof of

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[20] *Bell* v. *Pennsylvania Railroad Co.*, C.A. Ill. 284 F. 2d 297 (1960); *New York, N.H. & H. Railroad Co.* v. *Seaboard Sales Corp.*, C.A. Mass. 258 F. 2d 376 (1958).

[21] *Stelling* v. *Richmond County*, 66 S.E. 2d 807.

[22] This is not to accept the "convenience and needs" test as a negative element of the statute, for since the entire enacting clause is framed in the negative ["The responsible agency shall not approve"] this creates a double negative or an affirmative posture for the convenience and needs factor. Recasting the entire clause in the affirmative, it would read, "The responsible agency shall approve any merger in which the convenience and needs of the community to be served clearly outweighs any substantially anticompetitive effects thereof."

[23] *Meeks* v. *Meeks*, 25 So. 668 (Ala. 1946); *Hyde* v. *Chappell*, 22 S.E. 2d 313 (Ga. 1942).

[24] Corpus Juris Secundum, Evidence § 105.

[25] *Protective Life Insurance Co.* v. *Swink*, 132 So. 728, 728 (Ala. 1931). See also cases cited in footnote 20 supra.

the material elements of which will not establish even a prima facie violation of any statute. It appears inescapable then that plaintiff's pleading is fatally defective.

The further proposition advanced on this point; that "convenience and needs" is a "justification or exemption under a special exception to the prohibitions of a statute generally" and therefore a matter of defense, simply ignores the origins and the purposes of BMA-66.

It must be apparent from the most cursory examination of 5(B) that "Convenience and needs" and "substantially anticompetitive effects" are coordinate factors whose juxtaposition evidenced a Congressional purpose of judicial balancing.[26] With this obvious interpretation the legislative history is, naturally, in accord.

In introducing the legislative question Representative Smith (Va.) said:

> It boils down largely to a question of the Department of Justice, under the act, being required to use these standards where the main consideration is the convenience and the necessity of the community. The only authority that would be left to fix standards by the Department of Justice would be the monopoly provision of the Sherman Antitrust Act.[27]

[26] We note in passing, while rejecting the entire suggestion that "convenience and needs" is an exception to the general standards of BMA-66, that applicant's authority does not stand for the proposition that "convenience and needs"—if it were an exception—would be a matter of defense. *King & Howe* stands for the proposition that an exception in the enabling clause (as here) must be negatived by the pleader.

[27] Congressional Record, 2/8/66, p. 2332.

Representative Smith (Calif.)

H.R. 12173 will:

* * * Establish a standard [which will] add to the traditional standard of a lessening of competition [a] concept of convenience and needs of the community served.[28]

Representative Widnall (N.J.)

H.R. 12173 states the conditions under which the banking agencies may approve a merger that is opposed by the Department of Justice. Furthermore the bill gives the courts clear guidelines for weighing banking factors against competitive factors.[29]

Representative Moorhead

In H.R. 12173 we are merely saying that first the banking authorities, and then the Attorney General, and finally the courts may approve a bank merger "despite the foreseeable injury to competition" if "the merger would be consistent with the public interest" [quoting from *Seaboard Air Line R. Co. v. United States*, 34 L.W. 3181][30]

Representative Stanton

It was the expressed purpose and intent of Congress when it passed the Bank Merger Act in 1960 to make certain that control of bank mergers should be in the hands of the appropriate banking supervisory agencies, and that while the competitive effects of a proposed merger should be considered, they were not to be given a predominant position.

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[28] *Id.*, p. 2333.

[29] *Id.*, p. 2335.

[30] *Id.*, p. 2341.

These standards were repudiated by the Supreme Court in the *Philadelphia National Bank* and the *Lexington Bank* cases in which the Court decided that the Justice Department had the final say in bank mergers. Contrary to the intent of Congress, the bank regulatory authorities were relegated on advising roles.

These provisions * * * reinstate a measure of antitrust consideration which was lacking in the Senate bill, and they provide a banking standard that may allow economic assistance to a community even though a merger tends to lessen competition in that community. It is this statutory balance that was intended in 1960 * * *.

The * * * bill * * * directs the courts to apply the banking standards as well as the competitive standards in any judicial proceeding attacking an approved merger transaction * * * it * * * gives these standards equal weight as between economic and competitive circumstances and it assures this equilibrium throughout the entire review procedure.[31]

Senator Proxmire

Subsection 5(b) was designed to change the law as it now stands, to allow the convenience and needs of the community to outweigh any anticompetitive effects that the merger might have.

Thus, it is a new standard. It is a clearly different standard that would apply in the case of banks.[32]

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[31] *Id.*, p. 2343.

[32] Congressional Record, 2/9/66, p. 2548.

APPELLANT'S RECITATION OF CONGRESSIONAL HISTORY

Appellant has cited the same authorities in the same way here as in its brief in *Crocker*. The court there, after an extensive recitation of the Congressional history of the Act, adverted to the citations of authority advanced by Counsel for the Department of Justice:

> Counsel has largely confined their quotations to those from Congressmen Weltner and Todd, who opposed the bill, and from Congressman Patman who bitterly fought the legislation and finally, through a face-saving compromise, introduced the bill, while stating that if he alone were writing the bill, he "would be against it as a matter of principle." (Cong. Rec. Feb. 8, 1966, p. 2357.) Counsel's choice of makers of remarks is not very persuasive.[33]

CONCLUSION

We think that—verbiage aside—this Court is being asked to turn back the clock and reinstate Clayton § 7 in banking. Here, Justice knows defendant's contentions and our findings on the question of convenience and needs.[34] It is not willing to accept the challenge of contesting them.

> To prove that the merger is not, in fact, necessary to achieve the benefits that are claimed for it also involves speculation and conjectures.[35]

[33] Slip Opinion, p. 9.

[34] * * * defendants and the Comptroller urge very broad and general benefits to the community flowing from the creation of a larger bank with larger resources * * * (P. 15 Jurisdictional Statement)

[35] *Id.*

But the converse of this statement has equivalent probative merit. It was for this reason that the question was relegated to the administrative function. Appellant implies that the Courts cannot answer the question, yet insists that the regulatory agencies should not. We suggest that the position advocated by the appellant is hopelessly incongruent, and that, therefore, the judgment should be affirmed.

Respectfully submitted,

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JANUARY, 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967

IN THE

Supreme Court of the United States

October Term, 1966.

No. 972.

UNITED STATES OF AMERICA,
Appellant,

v.

PROVIDENT NATIONAL BANK, CENTRAL-PENN NATIONAL BANK OF PHILADELPHIA, and WILLIAM B. CAMP, Acting Comptroller of the Currency.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

MOTION TO AFFIRM

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UNITED STATES OF AMERICA,

Appellant

v.

PROVIDENT NATIONAL BANK, CENTRAL-PENN NATIONAL BANK OF PHILADELPHIA, AND WILLIAM B. CAMP, ACTING COMPTROLLER OF THE CURRENCY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, Appellees Provident National Bank and Central-Penn National Bank move to affirm the judgment below on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

1. INTRODUCTION

This is a suit by the Department of Justice to restrain a merger of the defendant Banks approved by the Comptroller of the Currency under the Bank Merger Act of 1966. The suit was dismissed with prejudice by the District Court on the eve of trial, because the Department of Justice re-

fused to sustain the burden of proof assigned to it by the Court in a pre-trial order. The dismissal by the District Court was a final judgment, such as would be entered on a directed verdict.

The complaint, the Comptroller's opinion, the relevant portions of the Bank Merger Act of 1966, and the three decisions of the District Court are printed as appendices to the Jurisdictional Statement and will be cited to that source in this motion.

2. HISTORY OF THE CASE

The history of this case can be said to begin with the enactment of the Bank Merger Act of 1960,[1] which was passed by Congress:

> "to provide for control of all mergers by asset acquisition by banks under the jurisdiction of the Federal banking agencies, under uniform and clear standards calling explicitly for consideration of both banking factors and competitive factors, but without giving sole and controlling effect to any single factor." Senate Report No. 196, 89th Cong., 1st Sess. (1959).

The 1960 Act required the bank regulatory agencies to consider the capital and earnings prospects of the banks, "the convenience and needs of the community to be served," and the possible effect of the proposed merger on competition. The Act specified that the agency should not approve the merger "unless, after considering all of such factors, it finds the transaction to be in the public interest."

In 1961, the Department of Justice sued to restrain the merger of Philadelphia National Bank and Girard Trust Corn Exchange Bank, which had been approved by the Comptroller under the 1960 Act. The District Court found for the defendants. This Court reversed, finding the merger (which would have created the largest bank in Philadel-

1. 74 Stat. 129 (1960).

phia)[2] to be in violation of Section 7 of the Clayton Act. The Court noted the argument of the defendants that Philadelphia needs a large bank to bring business to the area and stimulate its economic development, but said:

> "We are clear, however, that a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already by Congress when it enacted the amended § 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid." (374 U. S. 321, 371)

This Court's decision in *PNB-Girard* made a nullity of the bank regulatory agency's finding that the merger was in the public interest. The Bank Merger Act of 1966 was intended to reverse this result of *PNB-Girard* and to require the courts to consider the public interest just as the regulatory agencies are required to do. The 1966 Act permits the regulatory agency to approve an anticompetitive merger if the anticompetitive effects are clearly outweighed in the public interest by the convenience and needs of the community to be served. To prevent a repetition of *PNB-Girard,* the Act further provides that if an approved merger is attacked in court, the court shall "review de novo" the issues presented and apply the "identical" standards which the agency is directed to apply (Jurisdictional Statement, p. 27).

2. The bank resulting from the *PNB-Girard* merger would have held 36% of the bank assets in the Philadelphia area and would have been half again as large as its nearest competitor. In contrast, the bank resulting from the present merger will be the fourth largest in Philadelphia, holding less than 14% of the area's bank assets.

In November 1965, before the Bank Merger Act of 1966, the defendant Banks announced their intention to merge. On December 6, 1965, the Banks submitted to the Comptroller of the Currency an Application containing a fifty-page Economic Brief and supporting exhibits. These papers set forth the Banks' contentions that the merger will have no adverse effects on competition. They also show in detail that the merged bank will be better able to compete with the larger banks in Philadelphia, New York and other financial centers and will better serve the convenience and needs of the Philadelphia community—including those needs which this Court recognized, but held to be irrelevant, in *PNB-Girard.*

During the months that followed, the Banks, at the request of the Comptroller, filed with him voluminous supplemental material relating to competition and to the public interest to be served by the merger.

On March 31, 1966, the Comptroller issued his decision (Jurisdictional Statement, p. 28). He found that the merger "clearly conforms to the statutory criteria" of the Bank Merger Act of 1966 (*id.*, p. 51). He further found that "the competition which would be eliminated by this merger is miniscule," and that, on the contrary "the climate of competition would be stimulated by the increased capacity of a large scale bank, and the range of choices available to customers who require services which can only be rendered by a larger bank would be increased." (*Id.* at 49). He further found that the convenience and needs of the Philadelphia community would be served through the merger "by increased efficiency, by a greater lending capacity, through more adequate banking quarters, and by a generally improved quality of banking services. . . ." (*Id.* at 51).

The Comptroller concluded that: "We would be hindering the economic growth of Philadelphia if we failed to give our approval to this merger application." (*Ibid.*)

On April 1, 1966, the Department of Justice filed its complaint seeking an injunction under Section 7 of the Clayton Act. The complaint made no reference to the Bank Merger Act of 1966. Shortly thereafter, as permitted by the Act, the Comptroller intervened.

Throughout the pre-trial proceedings, the Department of Justice maintained that the Bank Merger Act of 1966 made no substantial change in the law concerning bank mergers. It argued that the Department need only prove a violation of Section 7 of the Clayton Act; that the burden of proof on the ultimate issue whether the merger is in the public interest (*i.e.,* whether any anticompetitive effects are clearly outweighed by the convenience and needs of the community) lies with the Banks; and that in reaching its decision on this point the District Court must disregard the administrative findings of public interest by the Comptroller. This position on the part of the Department of Justice, in due course, led to the dismissal of the action below. Thus:

(a) Pre-Trial Order No. 1 below (entered June 7, 1966) required the parties to file pre-trial briefs setting forth their legal contentions and the facts they expected to prove in support thereof. The factual sections of the Department's brief were limited almost entirely to the statistics from which it hoped to prove a violation of Section 7. The Bank Merger Act of 1966 was said to be an "exception" to the antitrust laws and therefore a part of the Banks' case only.

The Banks' pre-trial brief contained not only their contentions on competition, but also a detailed outline of the facts the Banks would prove to show that the merger is in the public interest. The Department's reply brief took no issue with these facts. Despite the fact that the Department had already received the Banks' answers to interrogatories as to convenience and needs, its reply brief said only that the Department "is not in a position to inform this Court whether

plaintiff believes the conclusions reached [in the Banks' pretrial brief] are correct or not." In short, the Department was unable to state a case on convenience and needs even by way of rebuttal.[3]

(b) In August, the Comptroller and the Banks moved to dismiss the complaint for failure to state a cause of action under the Bank Merger Act of 1966. The Department again argued that its sole responsibility was to state a claim under the Clayton Act. The Court sustained the complaint on the ground that, under principles of notice pleading, the Banks were sufficiently aware of the claim against them (Jurisdictional Statement, p. 17). The Court ruled, however, that:

> "The only suit open to Justice to enjoin a bank merger lies solely within the ambit of BMA-66." (*Id.* at 24)

(c) On November 4, the District Court heard argument as to the burden of proof and the weight to be given to the Comptroller's opinion. The Court then ruled that the proceedings would take the form of a review de novo similar to those in *First National Bank of Smithfield, North Carolina v. Saxon,* 352 F. 2d 267, 271 (4th Cir. 1965); that the Court would hear all evidence in law and in fact, and if it then appeared that the Comptroller's decision was dependent on an exercise of discretion, the Court would bow to that discretion; but that, if the Comptroller appeared to have abused, exceeded, or arbitrarily applied his discretion, the Court would set aside his approval (Jurisdictional Statement, pp. 14, 16). The Court further ruled that the Department of Justice, in order to make out a

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3. Under Pre-Trial Order No. 1, any issues, contentions or claims not set forth in the pre-trial briefs are to be deemed "abandoned, uncontroverted, or withdrawn." Accordingly, the Banks' case on community convenience and needs stands uncontroverted.

prima facie case, must establish that there are anti-competitive effects as defined in the Bank Merger Act and that these are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served (*id.* at 16, 17).

(d) On November 26, pursuant to order of the District Court, the Department of Justice filed a list of the witnesses it proposed to produce at the trial, together with an outline of their testimony—which was designed only to show a violation of the Clayton Act. The same document contained a "Statement of Position" which said that the Department did not intend, "in establishing a prima facie case, to offer proof either of the existence or the significance of 'convenience and needs' factors, if any there may be." The Banks subsequently filed a list of 18 witnesses and outlines of their testimony, disclosing the Banks' case on both competition and convenience and needs. A similarly lengthy list of witnesses, largely on convenience and needs, was filed by the Comptroller. To date, no rebuttal list has been filed by the Department.

(e) On December 2, by reason of the Department's "Statement of Position," the Banks filed a motion for final judgment such as would be entered under Rule 41(b) after completion of the plaintiff's case if the plaintiff had shown no right to relief.

(f) On December 29, the District Court dismissed the case with prejudice (Jurisdictional Statement, pp. 9, 14). In its opinion, the Court noted the Department's contention that, in determining the validity of the merger, the Court must come to its own conclusion "free of presumptions traceable to anyone," and said that this contention raises "the constitutional question of separation of powers." (*Id.* at 14). The Court concluded:

"The Court, therefore, finds that since Justice has definitely refused to try its case under BMA-66, the banks should not be subjected to the expense and inconvenience of a trial when Justice refuses to prove other than admitted facts to establish its case. Its position has been taken deliberately and directly in opposition to the ruling of the Court on October 13, 1966, and is consistent with the position of the Government on a nationwide basis, even though the Courts have been unanimous in refusing to accept its contention." (*Id.* at 12, 13)[4]

4. The Court cited the following District Court decisions: *U. S. v. Mercantile Trust Company, et al.*, 1966 BNA Antitrust and Trade Reg. Rep. No. 286 (1/3/67) page X-6, (E. D. Mo. December 19, 1966); *U. S. v. First City National Bank of Houston, et al.*, Civ. No. 66-H-695, S. D. Texas (oral opinion of December 2, 1966), Appendix A, Jurisdictional Statement, Case No. 914, October Term, 1966; *U. S. v. First National Bank of Hawaii, et al.*, Civ. No. 2540, D. Hawaii, 1966 (oral opinion of October 31, 1966, unreported); and *U. S. v. Crocker-Anglo National Bank, et al.*, 1966 Trade Reg. Rep. ¶71,898 (N. D. Cal.).

3. ARGUMENT

The Court below took the position that the function of the District Court under the Bank Merger Act of 1966 is to review the decision of the Comptroller. The Court will hear the evidence "de novo" (unavoidably since there was no hearing before the Comptroller), but the judgment it will make is whether the Comptroller acted within the bounds of the discretion entrusted to him by the Bank Merger Act, not whether the Court believes the merger to be in the public interest and not whether the merger would violate Section 7 of the Clayton Act (Jurisdictional Statement, p. 14). In no other way can the Bank Merger Act be construed constitutionally, since the determination of public interest is administrative and not judicial (Jurisdictional Statement, p. 12). In no other way can the Act be construed consistently with Congress' reiterated intent to empower the bank regulatory agencies to authorize mergers where the public interest clearly outweighs any visible impairment to competition (Jurisdictional Statement, p. 17).

The District Court's Decision As To Its Function Follows Established Precedent.

In construing the Bank Merger Act to require a review of the administrative finding of public interest, the Court below was following the ruling of the three-judge District Court in California which said: "It is plain to us that the congressional purpose here was to provide for an initial decision by the Comptroller and that the action brought by the Department of Justice should be deemed an action to review that decision. It is noteworthy that the section of the statute which uses the term '*de novo*' does not speak of a trial de novo but of a *review de novo*." *U. S. v. Crocker-Anglo National Bank, et al.*, 1966 Trade Reg. Rep. ¶ 71,898, page 83,156.

The California Court, like the Court below, based its decision on the constitutional separation of powers, saying:

> ". . . the problem of reviewing the second determination by the Comptroller, namely, whether the proposed transaction is outweighed in the public interest, and whether it meets the convenience and needs of the community, is plainly and unquestionably a legislative or administrative determination of a type which this court, as a constitutional court, is prohibited from deciding." 1966 Trade Reg. Rep. ¶ 71,898, page 83,154.

The findings of the California Court and the Court below with respect to the constitutional limitation on their powers is in accord with the decisions of this Court and is clearly correct. A constitutional court cannot "exercise or participate in the exercise of functions which are essentially legislative or administrative," *Federal Radio Commission v. General Electric Co.,* 281 U. S. 464, 469 (1930). The "ultimate reckoning of social or economic debits and credits . . . . is beyond the ordinary limits of judicial competence," *U. S. v. Philadelphia National Bank, et al.,* 374 U. S. 321, 371 (1963).[5]

The District Court's Decision As To Procedure Follows Established Precedent.

Having established that its function is to review the Comptroller's decision, the District Court assigned to the Department of Justice "the overall burden of persuasion to show the illegality of the merger" (Jurisdictional Statement, p. 17). This is the normal burden of persuasion undertaken by any plaintiff or petitioner seeking review of an administrative decision.

> "Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a pre-

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5. See also, *Federal Power Commission v. Idaho Power Co.,* 344 U. S. 17 (1952); *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.,* 289 U. S. 266 (1933).

sumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." *Federal Power Commission v. Hope Gas Co.*, 320 U. S. 591, 602 (1944). See also, *Interstate Commerce Commission v. City of Jersey City*, 322 U. S. 503, 512-513 (1944).

Normal review proceedings such as *Hope Gas* and *Jersey City* involve only the burden of persuasion. There is no occasion to consider the burden of producing evidence because there is no new evidence. The review is made on the record before the administrative body. In this case, however, the statute requires the review to be de novo, and the District Court held that in such a review the Department of Justice has the burden of coming forward with evidence (Jurisdictional Statement, pp. 16-17). In so doing, it was following *First National Bank of Smithfield, North Carolina v. Saxon, supra.*[6]

In the *Smithfield* case, the Comptroller had, without formal hearing,[7] approved a branch application in Smithfield, North Carolina. Thereafter, a competing bank filed an action to have the Comptroller's determination declared illegal on the ground that the failure to hold a hearing deprived the competing bank of due process of law. The Court of Appeals for the Fourth Circuit held that no hearing before the Comptroller was required, but that the competing bank was entitled to a full-dress hearing before the District Court.[8] The Court of Appeals said:

6. See also, *Webster Groves Trust Company v. Saxon*, Opinion of the Eighth Circuit Court of Appeals dated December 14, 1966 (reported in 35 L. W. 2348).

7. As is the case with mergers under the Bank Merger Act of 1966, no hearing on branch applications is required by the Banking Act.

8. The Court cited Section 10 of the Administrative Procedure Act (5 U. S. C. A. § 1009), which, in subsection (e), contemplates that the facts may be subject to trial de novo by the reviewing court.

> "The Banking Act, 12 U. S. C. § 36(c), in permitting bank branching 'with the approval of the Comptroller of the Currency' intended, we think, to allow the Comptroller to consider as a factor in his decision to grant or refuse approval, the public interest, need and necessity, and, subject to court review, to exercise his discretion in determining such interest, need or necessity. . . . On the remand of this case, the plaintiff may adduce evidence demonstrating the impermissibility of the Comptroller's approval of a branch bank at Smithfield. Testimony to the contrary will be receivable from the Comptroller. The Court will then find the facts. Thereon, it will judge de novo the validity, in fact and in law, of the Comptroller's final action." (352 F. 2d at 272)

As to the scope of review the Court of Appeals said:

> "If after the court has made its fact findings, it then appears that the decision of the Comptroller is dependent upon an exercise of discretion, the Court cannot substitute its discretion for the Comptroller's. However, it can set aside such a determination if, in the light of the facts found by the Court, it concludes that the Comptroller has abused, exceeded or arbitrarily applied his discretion." (352 F. 2d at 272)

The Court of Appeals characterized the foregoing procedure as a "review de novo" (352 F. 2d at 273).

In assigning to the Department of Justice the burden of persuasion and the burden of production of evidence on the ultimate issue of public interest, the District Court rejected the Department's contention that the Department can make out a prima facie case by showing merely a violation of the Clayton Act. The District Court said: "Proof of anticompetitive effects solely is no longer controlling. A merger may be anticompetitive and yet be legal because it promotes the public interest as set forth in the Act." (Jurisdictional Statement, p. 17).

The authority for the lower Court's ruling on this point is this Court's decision in *Seaboard Air Line R. Co. v. U. S.*, 382 U. S. 154 (1965). In *Seaboard*, the three-judge District Court had set aside an I. C. C. order approving a railroad merger because the I. C. C. had not determined whether the merger violated § 7 of the Clayton Act. This Court said: "By thus disposing of the case, the District Court did not reach the ultimate question whether the merger would be consistent with the public interest despite the foreseeable injury to competition" (382 U. S. at 156).

The Department Of Justice's Position Is Insubstantial.

The Department of Justice contends that the function of the District Court is to try the case de novo and come to its own conclusions as to the legality of the merger "independently of the Comptroller and free of presumptions traceable to anyone."

The fundamental infirmity in the Department's position is that it is unconstitutional. The cases cited above leave no doubt on that score. The Banks made the constitutional argument in their pretrial brief. The District Court rested its opinion squarely on the constitutional ground. The Department has never answered the point, and there is no hint of an answer in its Jurisdictional Statement. There can be no need for further argument where none has ever been made.

A second infirmity in the Department's position is that it would nullify the expertise of the bank regulatory agencies and leave the question of public interest in bank mergers to be decided by the District Courts. The actions of the regulatory agencies in passing upon bank merger applications are not isolated decisions—they are part of the overall regulatory process by which the agencies evolve a banking structure adequate to the public need. These decisions should be subject to review, like those of other administrative agencies. They should not be made anew

by whichever District Judges happen to be assigned to the bank merger cases which the Department of Justice elects to file.

The final infirmity in the Department's position is that it would nullify the Bank Merger Act of 1966 and perpetuate the situation which Congress sought to correct by enacting that statute.

The arguments which the Department of Justice has advanced in support of its position can be readily disposed of:

(a) The Department argues that convenience and needs is an "exception" to be proved by the Banks. In fact, the statute requires the regulatory agency to consider convenience and needs "in every case" (Jurisdictional Statement, p. 27). As the history of this case shows, every bank merger which becomes the subject of litigation will involve a contention by the Department that the merger is anticompetitive and a finding by the regulatory agency that it is nevertheless in the public interest. (If the agency found that the anticompetitive effects were paramount, it would not approve the merger in the first place). Thus, the validity of the agency's finding as to public interest is not a matter of exception; it is the ultimate issue in every case.[9]

(b) The Department also argues that the Banks should have the burden of proving convenience and needs because they have better access to the facts. Again, the refutation is to be found in the history of

9. The Department analogizes convenience and needs under the Bank Merger Act to the affirmative defense of cost justification under the Robinson-Patman Act. The difference is obvious. There is no weighing under the Robinson-Patman Act. If a defendant shows cost justification, he wins, regardless of the injury to competition. The Bank Merger Act requires in every case a weighing of convenience and needs against anticompetitive effects. The legality of the merger depends on this weighing—which is an administrative process.

this case. The Banks have already shown how the merger will serve the convenience and needs of the community in their application (which is supplied to the Department as a basis for its advisory report) and in their supplementary material (much of which was also sent to the Department). The Comptroller has made his findings as to convenience and needs. The Banks have stated their contentions at length in their pretrial brief and outlines of testimony. And they have answered the Department's interrogatories directed at this issue. The Department's problem is not that it does not know the Banks' contentions, but rather that it has no answer to them.

(c) The Department of Justice relies on quotations from legislators and a letter from the Attorney General to Congressman Patman during the legislative hearings. With respect to the quotations, the California Court remarked that "Counsel have largely confined their quotations to those from Congressmen Weltner and Todd, who opposed the bill, and from Congressman Patman who bitterly fought the legislation and finally, through a face-saving compromise, introduced the bill, while stating that if he alone were writing the bill, he 'would be against it as a matter of principle.' (Cong. Rec. Feb. 8, 1966, p. 2357). Counsel's choice of makers of remarks is not very persuasive."[10] With respect to the Attorney General's letter, it will be seen that the Attorney General was concerned because the bill then pending did not provide for a full hearing before either the Comptroller or the District Court. He suggested a "trial de novo" in the Court. Congress accepted his suggestion to the extent of providing for a full hearing allowing testimony de novo on all issues. But it provided that the hearing should be a "review"—not a "trial."

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10. 1966 Trade Reg. Rep. ¶ 71,898, page 83,152, fn. 3.

4. CONCLUSION

The decision of the Court below rests on settled principles of law, firmly established by this Court and others. Application of these principles to the issues presented by this appeal has been unanimously upheld by all the lower courts to whom the issues have been presented. The contentions of the Department of Justice would violate the Constitution and would lead to the undesirable result of having the public interest in bank mergers determined by District Courts rather than the bank regulatory agencies. Under these circumstances, review is unnecessary.

Respectfully submitted,

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Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 972

UNITED STATES OF AMERICA, APPELLANT

v.

PROVIDENT NATIONAL BANK, AND CENTRAL-PENN NATIONAL BANK OF PHILADELPHIA, AND WILLIAM B. CAMP, ACTING COMPTROLLER OF THE CURRENCY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellee, Comptroller of the Currency, moves that the judgment of the District Court be affirmed on the grounds that the questions raised by appellant are not new or novel and are so insubstantial as not to warrant further argument.

STATEMENT

On December 6, 1965, Provident National Bank and Central-Penn National Bank, pursuant to the Bank Merger Act of 1960, 12 U.S.C. § 1812(c), filed an application with the Comptroller of the Currency of the United States (hereinafter referred to as the Comptroller or Intervenor) for permission to merge. This was granted on March 4, 1966 under the standards of the new Bank Merger Act of 1966, 12 U.S.C. § 1828(c), hereinafter referred to as BMA-66. Following said standards of BMA-66, the Comptroller issued his opinion on March 31, 1966. This opinion was rendered after careful consideration of: extensive material submitted by the banks in support of the application to merge; opinions requested and received from the Federal Reserve Board and the Department of Justice, Antitrust Division; receipt of reports of bank examiners who conducted detailed examinations of each of the two banks; and, the reports of the Regional Comptroller of the Currency.

The Comptroller's opinion approving the merger stated, in substance, that the anticompetitive effect of the proposed merger would be insignificant but, in any event, any anticompetitive effects of the proposed merger would clearly be outweighed in the public interest by the desirable results of the merger in meeting the convenience and needs of the community to be served. Among other things he also contended that the proposed merger would have a favorable effect on competition rather than an adverse effect.

The Department of Justice filed suit on April 1, 1966, alleging a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, only. No reference was made at all to BMA-66. Later the Comptroller intervened and

Answers were filed. On August 11, 1966, the Comptroller moved to dismiss the Complaint on the grounds plaintiff failed to state a claim upon which relief could be granted by not filing under the proper statute and alleging a violation thereunder. Defendant banks also filed a motion to dismiss on August 22, 1966.

After filing of briefs and argument the District Court denied the motion to dismiss stating it did not sustain the position of the Department of Justice that it was entitled to sue under Section 7 of the Clayton Act. However, under the modern theory of notice pleading the court need only take judicial notice of the relevant statute (BMA-66), and federal acts are a proper subject for judicial notice. Therefore, in effect, the court amended the Complaint to charge a violation of BMA-66, instead of Section 7 of the Clayton Act. The Court also stated, in its opinion, that it was not necessary at that time to decide the question of who had the burden of proof under BMA-66.

On November 4, 1966, following the receipt of briefs and argument, Judge Clary ruled on the burden of proof question holding that plaintiff's only action lies within the ambit of BMA-66 which allows only one solution:

> Justice must prove a violation of BMA-66, Section 5(B). To show this violation, Justice has to prima facie establish (1) that there are anticompetitive effects, as defined in Section 5(B) and (2) that these anticompetitive effects are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. Only such a showing will make out a case for violation of BMA-66. Proof of anticompetitive effects solely is no longer con-

trolling. A merger may be anticompetitive and yet be legal because it promotes the public interest as set forth in the Act. Therefore, for Justice to show illegality, it must prove first that a merger is not only anticompetitive, but also prima facie that it is not in the public interest.

If and when Justice establishes such a prima facie violation of BMA-66, the burden of producing evidence will shift to the Banks and the Comptroller to counter the Justice Department's proof.

Once the Banks and the Comptroller have presented their case, Justice will be given an opportunity to rebut such matters as are raised by the Banks and Comptroller in regard to the convenience and needs test. In any event, however, Justice has the overall burden of persuasion to show the illegality of the merger.

In ruling on the weight to be given the findings of the Comptroller, the Court stated the substantial evidence rule should not apply. It distinguished the instant case from *United States* v. *Crocker-Anglo National Bank et al.* (N.D. Cal., Civil No. 41808) as there was a public, evidentiary hearing in the *Crocker* case. The Court found *First National Bank of Smithfield, North Carolina* v. *Saxon,* 352 F. 2d 267 (4 Cir. 1965), to be analogous to the instant case, thus allowing the Comptroller to act at his discretion.[1] Therefore, while the substantial evidence rule would apply in the

[1] In the *Smithfield* case the Court at p. 272 said:

> If after the court has made its fact findings, it then appears that the decision of the Comptroller is dependent upon an exercise of discretion, the Court cannot substitute its discretion for the Comptroller's. However, it can set aside such a determination if, in the light of the facts found by the Court, it concludes that the Comptroller has abused, exceeded or arbitrarily applied his discretion.

Crocker case a different application should be made in this case. The Court held:

> The substantial evidence rule, therefore, may be invoked only when a proper foundation is laid for it as was done in *Crocker*.
>
> Therefore, the Court will hear all evidence in law and in fact, and if after it has made its findings, it then appears that the decision of the Comptroller is dependent on an exercise of discretion, the Court will bow to that discretion. However, if from the fact findings, it appears that the Comptroller abused, exceeded, or arbitrarily applied his discretion, the Court will set it aside.

Subsequent to the Court's ruling on the burden of proof plaintiff filed a summary of evidence and statement of position taking the adamant position it would not accept the burden placed on it of attempting to prove a prima facie violation of BMA-66.[2]

After receipt of plaintiff's statement of position, motions for final judgment were made by defendant banks and the Comptroller. A hearing on said motions was held on December 12, 1966, and on December 29, 1966, Judge Clary handed down his opinion dismissing the complaint with prejudice and ordered the stay to be lifted not earlier than January 18, 1967.

Thus, the only questions that could possibly be brought before this Court are: (1) whether the Department of Justice must plead BMA-66 instead of Section 7 of the Clayton Act in attacking a bank merger; (2) which party has the burden of proof under BMA-66; and (3) the meaning of review de novo.

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[2] Plaintiff's summary of evidence and statement of position is attached to defendant banks memorandum in opposition to plaintiff's application for a Stay, as appendix 4.

ARGUMENT

Appellant Concedes BMA-66 Governs

In this case, unlike their position in *United States v. First City National Bank of Houston, No. 914,* the appellant does not raise the question as to whether Section 7 of the Clayton Act or BMA-66 should be pleaded in attacking a bank merger. The "Question Presented" in Appellant's jurisdictional statement is:

> Whether the Bank Merger Act of 1966 requires the government in an antitrust suit challenging a bank merger to establish not only that the merger may substantially lessen competition but also that its anticompetitive effects are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

Additionally in reemphasizing its position, appellant states at the end of its statement (p. 7):

> We emphasize there that the question presented, while nominally a narrow one of burden of proof, in fact involves the fundamental issue whether an antitrust action attacking a bank merger is basically a proceeding in review of the action of the approving banking agency.

It is therefore quite obvious that appellant concedes that the proper statute to plead in attacking this bank merger is BMA-66.

Burden of Proof Is Clearly on Appellant

An important question before this Court is the one of burden of proof. The legislative history and BMA-66 itself clearly show the Department of Justice has not only the burden of pleading but the burden of

proving all the standards set out in the Act. This question is conclusively answered by the long established principle that where the statutory standards are contained in one general clause and a proviso is contained as an intrinsic part of that enabling clause the plaintiff must allege and prove the standards and negate the proviso.[8]

This principle is at least as old as *United States v. Cook,* 84 U.S. 168 (1872). It is a long established rule that has never been overturned. In the Cook case this Court stated (p. 173):

> Where a statute defining an offence contains an exception, in the enacting clause of the statute, which is so incorporated with the langauge defining the offence that the ingredients of the offence cannot be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the accused is not within the exception, but if the language of the section defining the offence is so entirely separable from the exception that the ingredients constituting the offence may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference, as the

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[8] The general clause and proviso involved in this case are contained in BMA-66 Section 5(B), (12 U.S.C. § 1828(c)), which reads:

(5) The responsible agency shall not approve—

(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

matter contained in the exception is matter of defence and must be shown by the accused.

See also, *United States* v. *Cruikshank et al.*, 92 U.S. 542, 558 (1875); *United States* v. *Behrman*, 258 U.S. 280 (1922); and *Seese* v. *Bethlehem Steel Co.*, 74 F. Supp. 412, 416 (D. Md. 1947), aff'd, 168 F. 2d 58 (4th Cir. 1948).

United States v. *King and Howe*, 78 F. 2d 693 (2d Cir. 1935), relied on by appellant, is not inconsistent with the rules in *Cook*. In Appellant's jurisdictional statement[4] it quotes from *King* and *Howe* as follows: "that where a party relies upon a statute containing a general clause followed by an exception or proviso in a subsequent substantive clause, such exception is a matter of defense and need not be negatived." Said case concerned Section 7 of the Food and Drug Act, 21 U.S.C. § 8, which contains a general clause followed in subsequent provisions of the statute by an exception, 78 F. 2d 695. However, in BMA-66 (Sec. 5(B)) the standards are contained in one general clause and a proviso is contained as an intrinsic part of that enabling clause. Had the statute, referred to in *King* and *Howe*, contained the exception within the same general clause, the Department would have been required to negate the exception in its pleadings and proof in accordance with the established principles set out above.

Additionally, there is another long established principle of law that when a plaintiff challenges the valid-

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[4] Jurisdictional Statement in *U.S.* v. *First City National Bank of Houston, et al.* (at page 7), which was incorporated by reference by appellant.

ity and presumptive legality of an administrative decision, it must bear the burden of overcoming the presumptive legality of that decision. In *Goldberg* v. *Truck Drivers Local Union No. 299,* 293 F. 2d 807, 812 (6 Cir. 1961) cert. den., 368 U.S. 938, the Court said:

> In the absence of proof to the contrary, there is a presumption of regularity in the proceedings of a public officer. The burden is upon the party complaining to show otherwise.

This recent case is in accord with *United States* v. *Chemical Foundation,* 272 U.S. 1, 14-15, (1926) and *United States* v. *Jones,* 176 F. 2d 278, 282 (9 Cir. 1949).

Therefore, this particular question, burden of proof, long settled, is not new or novel and jurisdiction should not be noted in this case on such an established principle.

Review De Novo

Appellant asserts, on page 7 of its jurisdictional statement, that the burden of proof question also embraces the issue whether an antitrust action attacking a bank merger is a proceeding in review of the Comptroller's decision. This is true; and to the extent that if a review *de novo* is to be made rather than a trial *de novo,* the principle of law on burden of proof just stated above controls. It is the Comptroller's position that in an action brought by the Department of Justice attacking a bank merger there should be a review *de novo* of the decision or opinion of the Comptroller of the Currency by the Court. (Apparently the appellant still subscribes to its position that BMA-66 created no substantive changes and therefore an action attacking

a bank merger approved by the Comptroller must be subjected to a trial *de novo* by the Courts.[5])

The specially constituted three-judge court in *United States v. Crocker-Anglo National Bank,* 1966 Trade Cases, Par. 7,898 (N.D. Cal. 1966) delivered a well-reasoned opinion on the question of whether the court should review *de novo* the decision of the Comptroller and to what extent the review can be *de novo.* In the *Crocker* case the court came to the conclusion that BMA-66, including the legislative history of said Act, contradicted the position of the Department of Justice. After discussing the legislative history and certain provisions of BMA-66 (pp. 83,151-83,152), the court said on p. 83,153:

> Perhaps the most conclusive evidence of the fact that this Act alters the previous rules comes from a comparison of the language of this statute with what the Supreme Court said in the Philadelphia case, namely, that a bank merger such as that one "is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial." Section 18(c)(5), quoted above, expressly requires a consideration of similar factors thus rejected in Philadelphia.
>
> This statute makes a further alteration in the nature of the proceeding now before us. After

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[5] See *United States v. Third National Bank of Nashville et al.,* Par. 71,934, 1966 Trade Cases, p. 83291 when the Court said in part:

> The plaintiff's restrictive interpretation of the 1966 Amendment finds little support either in legislative history or in the text itself. On the contrary, both legislative history and the textual provisions of the Amendment strongly indicate that it was the intent of Congress to effect substantial changes in existing antitrust law relative to bank mergers as enunciated in the *Lexington* and *Philadelphia* cases. *United States v. Crocker-Anglo National Bank, et al.* supra.

providing for the time of commencement of an action brought under the antitrust laws arising out of a merger transaction, § 18(c)(7)(A) stipulates: "In any such action, the court shall review *de novo* the issues presented." Returning now to the provisions of § 2(c), requiring this court to "apply the substantive rule of law set forth in § 18(c)(5)", and to § 18(c)(7)(B), reciting that in any judicial proceeding attacking a merger transaction approved under paragraph 5, "the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph 5," *it seems clear that what we are now called upon to do is to review a decision and determination of the Comptroller of the Currency.* (Emphasis supplied)

Also, p. 83,155, the Court stated:

... If we look to the purpose beyond the statute and to the policy of the legislation as a whole we must conclude that Congress has framed an Act which contemplates, as an important part thereof, provisions for review of the Comptroller's action.

and p. 83,156:

It is plain to us that the congressional purpose here was to provide for an initial decision by the Comptroller and that the action brought by the Department of Justice should be deemed an action to review that decision. It is noteworthy that the section of the statute which uses the term *"de novo"* does not speak of a trial *de novo* but of a review *de novo*.

The legislative scheme here, in our view, resembles that which is elaborately spelled out in those sections of the Interstate Commerce Act which were discussed in the recent case of *Sea-*

board Air Line Company v. *United States,* 382 U.S. 154.

Chief Judge William E. Miller in his ruling in *United States* v. *Third National Bank of Nashville, et al.,* Par. 71,934, 1966 Trade Cases p. 83,286, 83,289-83,290, supported the ruling of the three judge court in the *Crocker* case as to the review *de novo* question and the scope and nature of judicial review to be made of the Comptroller's decision.

Chief Judge Clary, in ruling in the instant case on the weight to be given the opinion of the Comptroller in approving the merger distinguished the *Crocker* case from the instant case. In *Crocker,* the Comptroller's findings and opinions were based on a public evidentiary hearing. In the case at bar there was no such proceeding.[6] He stated in his oral decision dated November 4, 1966, (a copy of which is attached to Appellants' jurisdictional statement as Appendix A, II).

> The substantial evidence rule, therefore, may be invoked only when a proper foundation is laid for it as was done in *Crocker.*
>
> Therefore, the Court will hear all evidence in law and in fact, and if after it has made its findings, it then appears that the decision of the Comptroller is dependent on an exercise of discretion, the Court will bow to that discretion. However, if from the fact findings, it appears that the Comp-

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[6] In the instant case the Comptroller considered the material submitted by the banks; the advisory opinions of the Federal Reserve Board and of the Department of Justice, Antitrust Division; the reports of the bank examiners and the reports of the Regional Comptroller.

troller abused, exceeded, or arbitrarily applied his discretion, the Court will set it aside.

Among the cases supporting Judge Clary's ruling is *First National Bank of Smithfield, North Carolina* v. *Saxon*, 352 F. 2d, 267 (4 Cir. 1965). In *Smithfield,* the Comptroller approved a new branch without a hearing. In that case the Court said (p. 272):

> We have said the Comptroller did not act arbitrarily in not allowing a hearing. However, a necessary consequence of his unilateral procedure is that the facts on which the Comptroller presumably acted should not be given the preferred position accorded by the substantial-evidence rule. The rule would declare them indisputable if some reasonable basis for them may be found in the evidence. Applied here, the plaintiff would be bound by evidence offered in a proceeding in which it was not heard. Hence, there is no place in the review for an opening-presumption of correctness of any fact which it may appear to the Court was adopted by the Comptroller for his decision. . . . . If after the court has made its findings, it then appears that the decision of the Comptroller is dependent upon an exercise of discretion, the Court cannot substitute its discretion for the Comptroller's.

See also, *United States,* ex rel. *Weddeke* v. *Watkins,* 2 Cir., 166 F. 2d 369, 373, certiorari denied, 333 U.S. 876; *Northwest Bancorporation* v. *Board of Governors of the Federal Reserve System,* 303 F. 2d 832 (8 Cir. 1962); and, *First Wisconsin Bankshares Corporation* v. *Board of Governors of the Federal Reserve System,* 325 F. 2d 946, 948 (7 Cir. 1963).

The statement of this Supreme Court in *Securities and Exchange Commission* v. *Chenery,* 332 U.S. 194

(1947) is a guide to the judicial function as it applies to review of the actions of an administrative agency (p. 209):

> The Commission's conclusion here rests squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts. It is the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts. It is the type of judgment which administrative agencies are best equipped to make and which justifies the use of the administrative process. See *Republic Aviation Corp.* v. *National Labor Relations Bd.,* 324 U.S. 793, 800, 89 L. ed. 1372, 1377, 65 S. Ct. 982, 157 ALR 1081. Whether we agree or disagree with the result reached, it is an allowable judgment which we cannot disturb.

This Court also stated p. 208:

> The very breadth of the statutory language precludes a reversal of the Commission's judgment save where it has plainly abused its discretion in these matters. See *United States* v. *Lowden,* 308 U.S. 225, 84 L. ed. 208, 60 S. Ct. 248; *Interstate Commerce Commission* v. *Railway Labor Executives Asso.,* 315 U.S. 373, 86 L. ed. 904, 62 S. Ct. 717.

CONCLUSION

The Comptroller believes it has shown that the question presented by the appellant is not new or novel and does not present a question substantial enough for consideration by this Court. The issues raised by the question have already been determined by this Court and/or various Circuit Courts of Appeal.

It is therefore requested that the judgment of the District Court be affirmed.

Respectfully submitted,

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Office of the
Comptroller of the Currency.

January, 1967.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 914

UNITED STATES OF AMERICA, APPELLANT

v.

FIRST CITY NATIONAL BANK OF HOUSTON, SOUTHERN NATIONAL BANK OF HOUSTON, AND WILLIAM B. CAMP, ACTING COMPTROLLER OF THE CURRENCY

REPLY MEMORANDUM FOR THE UNITED STATES

Appellees suggest that this case merely raises the question whether the government must allege in its complaint that a merger's anticompetitive consequences are not outweighed by considerations of "convenience and needs."

We disagree.

First, the trial judge clearly dismissed this case because he believed that the United States was required to assume the burden of proof on the "convenience and needs" issue. The court stated:

> I understand the cases to hold the burden to be on the plaintiff to allege and *prove* an anti-

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competitive result of the merger and further that that is not outweighed by the convenience and needs aspect of the matter.

I think the Department of Justice has continued for reasons of its own to adopt a contrary interpretation. * * *

I have no desire to dispose of a case of this kind on a question of pleading. * * * [Emphasis added.]

Second, the appellee banks have already recognized that the district court's holding concerned the burden of proof and the very nature of the judicial proceeding, and not mere questions of pleading. For example, their Memorandum in Opposition to Plaintiff's Application for an Injunction Pending Appeal, filed in this Court on December 21, 1966, argued (p. 6):

The trial court held that a rebuttal of the Comptroller's finding, that the benefit to convenience and needs of the community to be served clearly outweighed the anticompetitive effects, was an essential element of the proof of violation in the court's review of the issues determined by the Comptroller.

(See Reply of the United States to Memorandum of Defendants Opposing Stay in *United States* v. *First City National Bank of Houston*, No. 914, October Term 1966, p. 1.)

Appellees contend that by this appeal the government is litigating the issues in the case piecemeal. But even if the government had amended its complaint and proceeded to trial on the merits, that would not necessarily have expedited the ultimate determination of the case. For if the district court upheld the

merger on an erroneous legal standard and the government successfully appealed, a second trial would likely have been necessary. In short, this appeal will avoid, not create, needless litigation.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JANUARY 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967

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No. 914

UNITED STATES OF AMERICA, APPELLANT

v.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

No. 972

UNITED STATES OF AMERICA, APPELLANT

v.

PROVIDENT NATIONAL BANK, CENTRAL PENN NATIONAL BANK OF PHILADELPHIA, AND WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the district courts (J.S. 914, App. A; J.S. 972, App. A) are not reported.

JURISDICTION

In No. 914, the judgment of the district court (J.S. 914, App. B) dismissing the government's complaint was entered on December 7, 1966. The United States filed a notice of appeal to this court on December 19, 1966. Probable jurisdiction of the appeal was noted on January 16, 1967. In No. 972, the judgment of the district court (J.S. 972, App. A, p. 14) dismissing the government's complaint was entered on December 29, 1966. The United States filed a notice of appeal to this Court on January 10, 1967. Probable jurisdiction of the appeal was noted on January 23, 1967. In both cases the jurisdiction of this Court to review the judgments below on direct appeal rests on Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29. *United States* v. *Continental Can Co.,* 378 U.S. 441; *United States* v. *duPont & Co.,* 353 U.S. 586.

QUESTIONS PRESENTED

1. Whether, under the Bank Merger Act of 1966, once the government in an antitrust suit challenging a bank merger establishes that the merger may substantially lessen competition, defendants have the burden of proving that the merger's anticompetitive effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

2. Whether, if the judgments below are reversed, the statutory stay of consummation of the mergers revives automatically, without further order by the district courts.

STATUTES INVOLVED

The pertinent portions of the Clayton Act, and the Bank Merger Act of 1966, are printed in App. A, *infra*, pp. 67–74.

STATEMENT

NO. 914

On May 12, 1966, First City National Bank of Houston and Southern National Bank of Houston entered into an agreement to merge. After the agreement was approved by the stockholders of each bank on or about June 16, 1966, an application for approval of the proposed transaction was made to the Comptroller of the Currency as required by 12 U.S.C. 1828(c). Under the Bank Merger Act of 1966 (App. A, *infra*, pp. 67–74), effective on February 21, 1966, a federal banking agency "shall not approve [a proposed bank merger] whose effect in any section of the country may be substantially to lessen competition, or tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." The Comptroller approved the proposed merger on September 20, 1966, although the Department of Justice and the Board of Governors of the Federal Reserve System had, pursuant to 12 U.S.C. 1828(c)(4), submitted reports to the Comptroller on the competitive factors involved, indicating that the merger would have serious anticompetitive effects.

On October 19, the Department of Justice filed a complaint (App. B, *infra*, pp. 75–82) in a federal district court challenging the proposed merger on the ground that it might substantially lessen competition in violation of Section 7 of the Clayton Act. The complaint was filed within thirty days of the Comptroller's approval, as required by the new Bank Merger Act of 1966. The Act also provides that in any antitrust suit involving a bank merger the court shall apply the same standards as the banking agency and "shall review de novo the issues presented."

The complaint alleged the following facts. First City, the acquiring bank, is the largest commercial bank in Harris County, Texas, and in the Houston metropolitan area.[1] Together with its affiliates, it accounts for about 29.6 percent of all commercial bank deposits in Harris County. Southern National, the acquired bank, is the sixth largest commercial bank in Harris County and in the Houston metropolitan area. With its two affiliates it accounts for approximately 2.8 percent of all bank deposits in the county. Commercial banking in Harris County is heavily concentrated. The five largest commercial banks account for approximately 66.3 percent of all the deposits and 65.2 percent of all the loans of the 85 commercial banks located in the county. This heavy concentration is in large part a direct result of past consolidations among banks in the area.

[1] The Houston Metropolitan Area consists of Harris, Brazoria, Fort Bend, Liberty, and Montgomery Counties. All figures given are as of December 31, 1965.

The merger of First City and Southern National would produce a bank having (with its affiliates) at least 32.4 percent of all bank deposits in the county. This would increase concentration among the five largest commercial banks in the Houston area to the point where they and their affiliates would account for about 78 percent of total bank deposits.

On October 26, 1966, the Comptroller intervened as a party in the action (as the new Bank Merger Act permits), and on the next day he moved to dismiss the complaint for failure "to state facts sufficient to support a cause of action * * *." On November 1, 1966, the defendant banks filed a motion for dissolution of the statutory stay[3] on the ground that "the plaintiff has made no allegation in its complaint challenging the findings and the determinations of the Comptroller, that any anticompetitive effects resulting from the proposed merger are clearly outweighed in the public interest, as arbitrary, capricious or not supported by substantial evidence. Nor has the plaintiff alleged facts which constitute all the elements of a violation of the Bank Merger Act of 1966, 12 U.S.C. § 1828(c), which is the controlling statute in this case. Because plaintiff refuses to meet its statutory burdens there is no reasonable probability that it will prevail in the trial on the merits."

On November 10, 1966, the Comptroller issued an opinion (App. C, *infra*, pp. 101–116) explaining why he

[3] Under the new Act, commencement of the antitrust suit operates to stay consummation of the merger unless "the court shall otherwise specifically order."

had approved the merger on September 20. He found that the merger would have no adverse effect on competition and that, in any event, "any anti-competitive effects of this transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the Houston area community * * *." On December 1, 1966—the day before the motions to dismiss and to dissolve the statutory stay were to be argued before the district court—the successor Comptroller (who had taken office subsequent to approval of the merger) issued a supplemental opinion (App. C, *infra*, pp. 83-101). In it he concluded that the question of convenience and needs need not be reached because, although competition would be lessened, there were no substantial anticompetitive effects, but that, even assuming that there were such effects, they were outweighed by the "manifold advantages accruing to the Houston area" (*id.* at 97). In particular, he believed that Houston needed bigger banks and that the "well-balanced, capable and progressive staff" (*id.* at 99) of Southern National, the smaller of the two banks, would infuse new life into First City.

After a hearing on December 2, the district court ruled (J.S. 914, App. A) that the Bank Merger Act of 1966 requires the government to plead and prove not only that the merger is anticompetitive but also that the competitive injury is not clearly outweighed by the convenience and needs of the community to be served. Accordingly, the court granted the Comptroller's motion to dismiss for failure to state a cause of action, but stayed dismissal for ten days to give the

government an opportunity to amend its complaint (J.S. 914, App. B).

In the same order the court granted the defendant banks' motion to dissolve the statutory stay, to become effective (if the government did not amend) on the date of dismissal. The government declined to amend, and on December 19, 1966, the court dismissed the complaint and dissolved the statutory stay. The court entered a temporary stay of the merger until December 22, 1966. The government filed an application for a further stay with this Court. After oral argument on the application, Mr. Justice Brennan referred the application to the Court, which granted it on January 16, 1967. In the same order the Court noted probable jurisdiction and granted the joint motion to advance the case on the calendar and to dispense with a printed record.

NO. 972

On or about November 10, 1965, the boards of directors of the Provident National Bank and the Central Penn National Bank of Philadelphia approved an agreement to merge the two banks. On December 6, 1965, the banks applied to the Comptroller of the Currency for approval of the proposed transaction. The Board of Governors of the Federal Reserve System and the Department of Justice, on January 7, 1966, submitted reports to the Comptroller on the competitive factors involved in the proposed merger (see J.S. 972, App. A, p. 18). The Board of Governors concluded that "the overall effect of the proposed merger on competition would be significantly adverse." The Attorney General concluded: "There are

strong reasons * * * for believing that the proposed merger would have an important adverse effect on competition within the Philadelphia banking market * * *. [T]he anticompetitive effects of this merger are important and considerable and there are likely to be no redeeming features." Despite these reports, the Comptroller approved the merger on March 4, 1966 (applying the standards of the recently enacted Bank Merger Act of 1966), and, on March 31, 1966, filed an opinion giving his reasons for approval. The opinion states (J.S. 972, App C, p. 51)

> that this merger, rather than having an overall adverse effect on competition, will have a favorable effect. Further, the increased ability of the resulting bank to serve the convenience and needs of the Philadelphia area by increased efficiency, by a greater lending capacity, through more adequate banking quarters, and by a generally improved quality of banking services makes this merger desirable. * * *

The opinion concludes that the merger "clearly conforms to the statutory criteria and is in the public interest."

On April 1, 1966, the Department of Justice filed a complaint (J.S. 972, App. D) in a federal district court charging that the proposed merger might substantially lessen competition, in violation of Section 7 of the Clayton Act. The complaint alleged the following facts: Provident, the acquiring bank, is the fifth largest commercial bank in the four-county Philadelphia area,[3] accounting for 9 percent of the

[3] This four-county area consists of Philadelphia, Bucks, Delaware and Montgomery Counties, Pennsylvania.

area's bank deposits of individuals, partnerships and corporations (IPC deposits). Central Penn, the acquired bank, is the sixth largest. It accounts for approximately 5 percent. Commercial banking in this area is already heavily concentrated. The five largest banks account for some 71 percent of all IPC deposits and 74 percent of all loans of the 37 banks located in the area. This heavy concentration is in large part a direct result of past consolidations. The merger of Provident and Central Penn would increase concentration among the five largest commercial banks in the four counties to the point where they would account for about 76 percent of total IPC deposits.

On August 11, 1966, the Comptroller (who had intervened as a party in the antitrust action) moved to dismiss the complaint, and on August 22 the defendant banks followed suit. They argued in effect that the government was unwilling to shoulder the burden of proving that the merger was not justified by its probable effect in meeting the convenience and needs of the community. The district court initially denied the motions to dismiss (J.S. 972, App. A, pp. 17–25), on the ground that the action was "now only at the notice pleading stage" and that the complaint was adequate to place the parties on notice that the government believed that the merger was illegal under the Clayton Act as modified by the Bank Merger Act of 1966. However, on November 4, the district court ruled that in order to prove that the merger was illegal the government would be required to show both that the merger would have substantial anticompetitive effects and "that these anticompetitive effects are

not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." (J.S. 972, App. A, pp. 14–17.) The court indicated that great weight would be accorded the findings of the Comptroller: if it "appears that the decision of the Comptroller [approving the merger] is dependent on an exercise of discretion, the Court will bow to that discretion. However, if from the fact findings it appears that the Comptroller abused, exceeded or arbitrarily applied his discretion, the Court will set it aside." (J.S. 972, App. A, p. 16.)

On December 2, 1966, the defendant banks moved for entry of a final judgment dismissing the complaint on the ground that the government had indicated in various filings that it was unwilling to assume the burden of proof on the "convenience and needs" issue. The Comptroller made a similar motion on December 6. On December 29, the district court granted the motions, holding that the government must bear the burden of proof on the "convenience and needs" issue. The court indicated that one reason for its holding was its view that the government was in error in believing that the court "must make an independent decision as to whether the public interest in the merger outweighs any anticompetitive effects." (J.S. 972, App. A, p. 12.)

At the same time that the court dismissed the complaint, it lifted the statutory stay of the merger, but provided that the merger could not be consummated before January 18, 1967. The government filed an application with this Court for a stay. Mr. Justice

Brennan granted the application. On January 23, 1966, this Court noted probable jurisdiction. In its order it granted the motion to advance and to dispense with a printed record, and set the case for oral argument immediately following No. 914.

SUMMARY OF ARGUMENT

The Bank Merger Act of 1966 amends the Bank Merger Act of 1960 by forbidding the federal banking agencies to approve any bank merger whose effect may be substantially to lessen competition, unless its anticompetitive effects are "clearly outweighed in the public interest" by the merger's "probable effect * * * in meeting the convenience and needs of the community to be served." The new Act also provides that, in any antitrust action challenging a bank merger, the court shall apply the same standard as the agency, and shall "review de novo the issues presented." These appeals, arising from the dismissal of two separate antitrust actions challenging bank mergers under the new standard, present as the main question whether the 1966 Bank Merger Act requires the government to assume the burden of proving that the merger's adverse effects are not clearly outweighed by considerations of community convenience and need. An additional question is whether consummation of the merger will remain automatically stayed if this Court reverses the district court judgments.

I

If settled principles of evidence be applied to the interpretation of the Act, there is little doubt that

the defendant banks and not the government should be required to shoulder the burden of proof on the convenience and needs issue. The burden of proving justification or exemption under a special exception to the prohibitions of a statute normally rests on one claiming the benefits of the exception. It is plain that the convenience and needs defense constitutes such a special exception, and a review of legislative history shows that Congress specifically understood that the banks would bear the burden of establishing the defense. Moreover, this is a practical result, since it requires the party with greater access to the relevant information to produce it and avoids forcing the other party to prove the negative of a proposition.

II

We next consider the contention that Congress intended by the 1966 Bank Merger Act to create a scheme for administrative, not judicial, adjudication of legality—a scheme whereby the court in the antitrust action is limited to deciding whether an agency decision approving the challenged merger is supported by substantial evidence and not vitiated by legal error. The contention is relevant to the question presented here because were the scheme of the statute as described, it could be argued plausibly that the burden is indeed on the government to negate the agency's finding that the anticompetitive effects of the challenged merger are clearly outweighed by countervailing considerations of community convenience and needs.

A.

But that is not the scheme of the Act. Proposals that would have created just such a relationship between agency and courts were repeatedly rejected. The compromise bill that emerged and was enacted as the Bank Merger Act of 1966 was designed 1) to tighten the standard used by the banking agencies in passing upon merger applications—the agencies having proved lax in preventing anticompetitive bank mergers—and, 2) in the interest of uniformity of administration and to mitigate the severity of applying strict antitrust standards to the banking industry, to require the courts in antitrust suits involving bank mergers to apply the same new standard as the agencies. But no intent to give primacy to the agency's determination or to relegate the antitrust court to a subordinate reviewing role is inferrable from the history and debates of the 1966 Act.

On the contrary, the provisions of the Act themselves make quite clear that the antitrust court was to make an independent determination. The judicial proceedings are referred to as antitrust—not review—proceedings, a misnomer if the court was intended only to satisfy itself that the agency decision was adequately supported. The Act also directs the antitrust court to apply the same standard as the agency; a review standard would, of course, be a different standard. The Act contains no provisions for the agency to conduct a hearing on a merger application, and in fact the banking agencies typically do not. It would be anomalous to accord great weight to so informal a

determination. Finally, at the suggestion of the Attorney General Congress included a provision that "the court shall review de novo the issues presented." This provision was meant to assure that the court would make an independent determination of liability—would review the issues themselves and not merely the agency's decision—and so the members of Congress understood it.

B.

The standard of the new Act is one the courts can independently apply without risking intrusion upon functions constitutionally reserved to administrative agencies.

1. Federal judges are frequently called upon to balance competing considerations under generally worded statutes—notably in the antitrust area itself. It is not seriously suggested that such adjudications raise constitutional questions. Moreover, the standard of the Bank Merger Act of 1966 is far from being a broad "public interest" standard. The text and history of the Act show that the "convenience and needs" defense—the only possible source of vagueness—was intended to have a precise and limited content. The only factors that may be relevant to establish the defense—whether one of the defendant banks is floundering or stagnating or in peril of failure, whether the merger may have beneficial competitive effects outside the particular markets that the merging banks currently serve, and whether the merger is necessary to bring an important new banking service to the community—are all ones that courts are fully

capable of determining and evaluating. Moreover, the task of weighing them against the anticompetitive effects of the merger has been simplified by Congress' provision that the merger is not to be excused unless the competitive effects are "clearly" outweighed by the countervailing benefits.

2. Nor is the agency conspicuously better equipped than the court, in these cases, to make the ultimate judgment that the Act requires. The predominant element of the legal test under the Act is competitive effect—a subject on which the courts are plainly more experienced than the banking agencies. There is thus no sound reason why the agency's judgment should be accorded great weight.

III

The Bank Merger Act of 1966 provides that the commencement of an antitrust suit challenging an approved merger within the time permitted by the Act shall stay the agency's approval, unless the court otherwise specifically orders. In the present cases the courts below dissolved the stautory stay as an incident to dismissing the government's complaints. The question arises whether the stay automatically revives if this Court reverses the judgments of dismissal or whether a further order of the district court is required. We think the former. To avert the extreme practical difficulties that attempts to divest bank mergers pose, Congress intended the legality of bank mergers normally to be determined in advance of their consummation. Consistently with this principle, we think that when dissolution of the statutory stay is

premised on an erroneous judgment of dismissal, the dissolution falls with the judgment and the stay revives automatically. We also suggest the standards that, in our view, should govern the district court's consideration of any motion by the defendant banks to dissolve the statutory stay while the litigation is in progress.

ARGUMENT

INTRODUCTION

These consolidated cases are the first to bring before this Court the Bank Merger Act of 1966 (P.L. 89-356), which became effective on February 21, 1966. While the principal question presented is seemingly a narrow one of determining where the burden of proving certain issues in antitrust proceedings affected by the new Act lies, it cannot properly be considered *in vacuo*. Accordingly, we open our discussion with a brief description of the structure and principal provisions of the Act.[4]

The Act had three principal purposes: to settle the antitrust status of certain bank mergers consummated prior to its enactment; to create a new standard to guide the federal banking agencies in passing upon merger applications; and to create new rules for antitrust proceedings involving mergers approved by the agencies. All of these purposes have at least some bearing upon the issues before the Court.

1. Section 2 of the Act pertains to mergers consummated before its enactment. Section 2(a) establishes a conclusive presumption that any merger in

[4] The Act is reprinted in its entirety in App. A, *infra*, pp. 67-74.

which consummation occurred prior to June 17, 1963 (the date of this Court's decision in *United States v. Philadelphia National Bank*, 374 U.S. 321, which first held that Section 7 of the Clayton Act applies to bank mergers), and in which divestiture of the acquired bank had not yet been effected at the time the new Act was passed, did not violate the antitrust laws (other than Section 2 of the Sherman Act, 15 U.S.C. 2).[5]

2. Section 18(c) of the Federal Deposit Insurance Act, 12 U.S.C. 1828(c), requires banks subject to federal supervision (national banks, State banks that belong to the Federal Reserve System, and non-member State banks that carry federal deposit insurance) to obtain the permission of the appropriate federal banking agency[6] to merge or consolidate with another bank. Before acting on the application, the responsible agency "shall request reports on the competitive factors involved from the Attorney General and the other two banking agencies" (see note 6, *supra*), 12 U.S.C. 1828(c)(4). The Bank Merger Act of 1966 lays down a new standard which the agency must apply in passing on the application. It provides (12 U.S.C. 1828(c)(5)):

[5] Section 2 of the Sherman Act proscribes monopolization and attempts and conspiracies to monopolize.

[6] The Comptroller of the Currency, if the acquiring bank is a national bank; the Board of Governors of the Federal Reserve System, if the acquiring bank is a State member bank; the Federal Deposit Insurance Corporation, if the acquiring bank is a nonmember insured bank. 12 U.S.C. 1828(c) (1), (2).

The responsible agency shall not approve—

(A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

3. Under the new Act, if the banking agency approves a merger, it must notify the Attorney General, and the merger may not be consummated until 30 days have elapsed from the date of the agency's approval. 12 U.S.C. 1828(c)(6). "Any action brought under the antitrust laws arising out" of the merger "shall be commenced" within the 30-day period. 12 U.S.C. 1828(c)(7)(A). After that period, the merger may not be attacked in an antitrust suit

except in one based on Section 2 of the Sherman Act. 12 U.S.C. 1828(c)(7)(C).

The Act further provides that "[t]he commencement of * * * [the antitrust] action shall stay the effectiveness of the agency's approval unless the Court shall otherwise specifically order", and that in the antitrust action "the court shall review de novo the issues presented." 12 U.S.C. 1828(c)(7)(A). The banking agency that approved the merger "may appear as a party of its own motion and as of right, and be represented by its counsel." 12 U.S.C. 1828(c)(7)(D). Finally, unless the antitrust suit is based on Section 2 of the Sherman Act, "the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5)" (12 U.S.C. 1828(c)(7)(B)), which is quoted *supra*, p. 18.

Such in brief is the structure of the Act that this Court must here construe. With this as background we turn to the issues presented by these appeals.

I

IT IS A SETTLED PRINCIPLE THAT ONE WHO SEEKS THE BENEFIT OF A STATUTORY EXEMPTION MUST ESTABLISH HIS ENTITLEMENT TO IT. CONGRESS CLEARLY INDICATED THAT THIS RULE WAS TO BE APPLIED TO CLAIMS UNDER THE BANK MERGER ACT OF 1966 THAT A MERGER'S ADVERSE COMPETITIVE IMPACT IS CLEARLY OUTWEIGHED BY ITS PROBABLE EFFECT IN MEETING THE CONVENIENCE AND NEEDS OF THE COMMUNITY TO BE SERVED

Under the Bank Merger Act of 1966, a bank merger shown in an antitrust suit to have substantial anti-

competitive effects is unlawful "unless [those effects] are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." The principal[7] question for decision here is whether the burden of proof is on the defendant banks to establish that an anticompetitive merger is within this exception.

Prima facie, an affirmative answer seems inescapable. It is hornbook law "that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." *Federal Trade Commission* v. *Morton Salt Co.,* 334 U.S. 37, 44-45; *Javierre* v. *Central Altagracia,* 217 U.S. 502, 508; *United States* v. *Fleischman,* 339 U.S. 349; *McKelvey* v. *United States,* 260 U.S. 353; *Williams* v. *United States,* 138 F. 2d 81 (C.A. D.C.); *Nicoli* v. *Briggs,* 83 F. 2d 375 (C.A. 10); *United States* v. *King & Howe,* 78 F. 2d 693 (C.A. 2).[8] The rule fits squarely the pertinent

[7] The other question in the case relates to the Act's provision for stays of bank mergers pending antitrust suits attacking them.

[8] *United States* v. *Cook,* 17 Wall. 168, and *United States* v. *Behrman,* 258 U.S. 280, relied on by appellees, are not to the contrary. Those cases (both of which sustained the indictments involved) stand for the unexceptionable proposition that a criminal indictment must adequately inform a defendant of the elements of the crime with which he is charged. The complaints in these civil cases are detailed and obviously adequate to inform the opposing parties of what they must meet and defend. See J.S. 972, App. A, pp. 17-25. Nor does *Seese* v. *Bethlehem Steel Co.,* 74 F. Supp. 412 (D. Md.), help appellees. The court held there that the plaintiff was required

language of the Bank Merger Act. Anticompetitive bank mergers are broadly proscribed, subject only to an exception for those mergers whose adverse competitive effects are "clearly outweighed" by certain other factors. The syntax—a dependent clause introduced by "unless"—makes manifest the exceptional nature of the justification. This is further reinforced by the provision that, to save an anticompetitive merger from condemnation, the merger's adverse effects must be not only "outweighed," but "clearly" so, by extenuating factors; Congress could hardly have been more emphatic in indicating that justifiably anticompetitive bank mergers would indeed be exceptional.[9]

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in his complaint to negative a provision of the Portal-to-Portal Act beginning with the word "except" because the "Act in this respect *does not constitute technically an exception* to the general liability under the Fair Labor Standards Act but is an enactment by Congress which specifically defines what constitutes compensable time under the Fair Labor Standards Act," 74 F. Supp. at 415-416 (emphasis added). Nor does it make any difference that the exception in the present statute occurs in the same clause as the basic prohibition, rather than before or after it. See, *e.g.*, *Freight Consolidators Cooperative, Inc.* v. *United States*, 230 F. Supp. 692 (S.D.N.Y.); *Williams* v. *United States*, 138 F. 2d 81 (C.A. D.C.); *United States* v. *King & Howe*, 78 F. 2d 693 (C.A. 2). So, also, it is a matter of indifference whether the exception is set off by parentheses or commas. *Nicoli* v. *Briggs*, 83 F. 2d 375 (C.A. 10).

[9] The House Report (H. Rep. No. 1221, 89th Cong., 2d Sess., pp. 3-4) explicitly states:

> * * * the bill acknowledges that the general principle of the antitrust laws—that substantially anticompetitive mergers are prohibited—applies to banks, but permits an *exception* in cases where it is clearly shown that a given merger is so beneficial to the convenience and needs of the community to be served * * * that it would be in the public interest to permit. [Emphasis added.]

To require the government to bear the burden of proving that a merger's anticompetitive effects were not clearly outweighed by justifying factors would also offend the principle that normally the burden of proof rests on the party having the affirmative—not the negative—of the issue. *United States* v. *Fleischman*, 339 U.S. 349; *United States* v. *Denver & R. G. R.R.*, 191 U.S. 84; 1 Jones, *Evidence* (5th ed., 1958), § 209. Here, moreover, as in *United States* v. *Denver & R. G. R.R.*, *supra*, 191 U.S. at 91, a different rule "would require the plaintiff not only to establish a negative, * * * but to establish it by testimony peculiarly within the knowledge of the defendant." See, also, *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61; *Morrison* v. *California*, 291 U.S. 82; 9 Wigmore, *Evidence* (3d ed., 1940), § 2486; McCormick, *Evidence* (1954), p. 318. More often than not, evidence showing that a bank merger may be within the exception provided in the Act is likely to be in the possession of the defendants. Certainly the banks are more intimately familiar than the government with their own "financial and managerial resources and future prospects"—the factors the Act specifically states should be considered in determining effect upon community convenience and needs.

That the construction indicated by these principles was intended by Congress is borne out by the fact that every Congressman who spoke to the question was explicit that the burden of proving the convenience and needs defense would be on the banks. The sponsor of the bill that was finally enacted (Congressman Patman) stated: "It should be clearly noted

that the burden of establishing such 'convenience and needs' is on the banks seeking to merge; and when we say clearly outweighed we mean outweighed by the preponderance of the evidence.'" 112 Cong. Rec. (daily ed.) 2333–2334. Congressman Reuss, one of the bill's principal draftsmen, said that the bill "means that an anticompetitive merger should be approved only in a case where the proponents of a bank merger can establish that the advantage of the merger in terms of the convenience and needs of the community clearly outweighs the anticompetitive effects of the merger. This intentionally creates a heavy burden for the proponents of a merger and I anticipate very few cases in which this burden could be sustained." 112 Cong. Rec. (daily ed.) 2337. And in dissenting from the House Report, Congressman Todd indicated his agreement that "the burden of proof shall be upon the merging institutions to show that any substantial lessening of competition caused by the merger is clearly outweighed in the public interest." H. Rep. No. 1221, 89th Cong., 2d Sess., pp. 37–38.

We would rest our case here, but for the contention that Congress intended by the Bank Merger Act of 1966 to create a scheme of administrative adjudication of bank merger cases with the courts limited to a strictly reviewing role—determining whether the banking agency's findings, approving the merger, are supported by substantial evidence. Were that the scheme of the statute, much could be said for the proposition that the antitrust plaintiff must show affirmatively that the agency erred in deeming the merger's anticompetitive effects "clearly outweighed" by con-

siderations of community convenience and need—must show, in other words, that the competitive effects are *not* clearly outweighed. But that is not the scheme of the new Act. Congress, to be sure, has required that all proposed mergers involving banks subject to federal supervision obtain the approval of the responsible federal banking agency. But it has also very clearly provided that if such an approved merger is challenged in an antitrust suit, the court shall make an independent determination of legality—not merely review the agency's decision to the limited extent that orders of administrative agencies like the Interstate Commerce Commission are reviewed.

We devote Part II of our argument to an exploration of this—the underlying—issue in the case: What is the nature of the regulatory scheme that the new Bank Merger Act creates?

II

THE BANK MERGER ACT OF 1966 CONTEMPLATES THAT THE COURT IN AN ANTITRUST ACTION INVOLVING A BANK MERGER SHALL MAKE AN INDEPENDENT DETERMINATION OF THE LEGALITY OF THE MERGER UNDER THE STANDARDS OF THE ACT—NOT MERELY REVIEW THE BANKING AGENCY'S DETERMINATION TO ASCERTAIN WHETHER IT IS SUPPORTED BY SUBSTANTIAL EVIDENCE

Appellees argue that, in passing the Bank Merger Act of 1966, Congress intended that the district court in an antitrust suit involving a bank merger would henceforth accord the banking agency's approval of the merger presumptive validity, and hold the merger illegal only if it was persuaded that the agency's ac-

tion had been clearly unsupported. From this they reason that the plaintiff must establish not only that the merger has substantial anticompetitive effects but also that the agency erred in finding those effects clearly outweighed by considerations of community convenience and need. We challenge the premise. No provision of the Act purports to give primacy to the agency's determination. All indicates are that Congress intended the court to exercise an independent judgment in applying the new legal standard created by the Act. That standard, moreover, is readily susceptible of effective judicial application.

A. THE BACKGROUND, THE PURPOSES, AND THE PROVISIONS OF THE ACT ALL DEMONSTRATE THAT THE COURT IS TO EXERCISE AN INDEPENDENT ROLE IN APPLYING THE STATUTORY STANDARD

1. Behind recent bank merger legislation lies, ultimately, Congressional concern with the apparent unwillingness or inability of the Federal banking agencies—to which virtually all proposed bank mergers must be submitted for approval (see p. 17, *supra*)—to stem the tide of mergers that unduly lessen competition in this most vital industry. Such concern first became acute in 1960. During the decade that ended that year, 1503 independent banks—with total resources of more than $25 billion—had disappeared through merger. *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 326. The Bank Merger Act of 1960 for the first time expressly directed the agencies to "take into consideration the effect of the transaction on competition," but the Act failed to indicate the weight to be assigned this

factor.[10] The legislative history of the 1960 Act makes plain that Congress believed current regulation was inadequate to cope with anticompetitive bank mergers[11] and intended that the new standard would "make mergers of banks more difficult." 105 Cong. Rec. 8131 (remarks of Senator Robertson). Its purpose was "to promote a sound banking system in the interest of the government, borrowers, depositors and the public; and to promote competition as an indispensable element in a sound banking system." S. Rep. No. 196, 86th Cong., 1st Sess., p. 23. See, also, *id.* at 8; H. Rep. No. 1416, 86th Con., 2d Sess., pp. 3, 5.[12] Congress be-

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[10] The Act, 74 Stat. 129, 12 U.S.C. 1828(c), provided in pertinent part:

> In granting or withholding consent under this subsection, the Comptroller, the Board, or the Corporation, as the case may be, shall consider the financial history and condition of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served, and whether or not its corporate powers are consistent with the purposes of this chapter. In the case of a merger, consolidation, acquisition of assets, or assumption of liabilities, the appropriate agency shall also take into consideration the effect of the transaction on competition (including any tendency toward monopoly), and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest.

[11] See, *e.g.*, 105 Cong. Rec. 8131 (remarks of Sen. Robertson); Interim Report of the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 1st Sess., p. 40; S. Rep. No. 196, 86th Cong., 1st Sess., p. 1.

[12] During the debates on the 1966 Act, remarks made by several Congressmen reflect the understanding that the object of the 1960 Bank Merger Act had been to make it more difficult

lieved that the new law would stop most anticompetitive mergers, albeit recognizing that some would be justified by "banking" considerations.[13]

These expectations were not fulfilled. The banking agencies rarely turned down a merger application under the new Act,[14] although many proposed bank mergers appeared to have gravely anticompetitive effects. As many as 30 percent of those approved may have produced concentration as serious as that involved in *United States* v. *Philadelphia Na-*

for banks to merge. See remarks of Representative Patman, 112 Con. Rec. (daily ed.) 2335; remarks of Representative Minish, 112 Cong. Rec. (daily ed.) 2344.

[13] The Senate Report, p. 23, states:

> The decision in most cases can be expected to be clear. In many cases the proposed merger will not reduce competition at all and there will be sound and convincing banking reasons for authorizing the merger. In other cases the proposed merger will clearly increase and strengthen competition, and there will be no banking factors which might lead to rejection of the merger. In still other cases there will be serious danger of very considerable reduction in competition, and few or no sound banking reasons to approve the merger. In any of these cases, there need be little hesitation in approving or denying the application.

[14] In a careful study done for the Federal Reserve Board by Professors Hall and Phillips, *Bank Mergers and the Regulatory Agencies*, (Federal Reserve Board 1964), the authors show that between May 1960, when the Bank Merger Act was passed, and the end of 1962 the bank agencies considered 434 applications to merge. The Attorney General reported adverse competitive consequences in 200 of these cases. Nonetheless, the agencies approved mergers in 414 cases. In other words, although the Department of Justice reported adverse competitive consequences in 46 percent of the cases, only 4.6 percent were disapproved (*id.* at 23, 27, 43, 46, 57, 60).

tional Bank, 374 U.S. 321.[18] Failing to persuade the agencies to take a stricter line, the Department of Justice instituted antitrust actions against some of the banks whose mergers had been approved. This program of enforcement culminated in the *Philadelphia Bank* decision, *supra,* in which this Court (on June 17, 1963) held that bank mergers were fully subject to Section 7 of the Clayton Act, 15 U.S.C. 18—the Celler-Kefauver Anti-Merger Act. In so holding, the Court expressly rejected the contention that the Bank Merger Act of 1960 "immunize[d] approved mergers from challenge under the federal antitrust laws." 374 U.S. at 350. The Court stressed that the Act contained no immunity provision and did not even provide for a hearing before the banking agency on a merger application. *Id.* at 351. The Court did not consider what, if any, weight the agency's determination should be accorded in the antitrust case. However, there is no suggestion in the Court's opinion that such determination was to enjoy any presumption of correctness or that the task of the Section 7 court was merely to review the agency's findings, and it is significant that the Court's analysis of the legality of the challenged merger contains only a single reference to the agency's findings. *Id.* at 361–362.

Some believed that the standard of Section 7—which, as explained by the Court, seemed to make

[18] Hall and Phillips, *supra,* at 124. In the *Philadelphia Bank* case the merger combined the second and third largest banks in the Philadelphia area into a single bank accounting for more than 30 percent of the market. *United States* v. *Philadelphia National Bank, supra,* at 364.

competitive effect virtually the sole test of legality [16]—was too stringent to be entirely suitable for the banking industry, in view of the unique public interest in sound and viable banks.[17] This impression was reinforced when the Court applied a similarly strict competitive standard under Section 1 of the Sherman Act in *United States v. First Nat. Bank & Trust Co. of Lexington*, 376 U.S. 665. In addition, bank mergers challenged under Section 7 that had been consummated before the *Philadelphia Bank* decision were said to pose insoluble problems of divestiture (see pp. 56-59, *infra*).[18] Accordingly, on April 5, 1965, Senator Robertson introduced a bill in the Senate (S. 1698, 89th Cong., 1st Sess.) that would have (1) excused from antitrust prosecution those bank mergers currently under court challenge, and (2) granted the banking agencies exclusive jurisdiction to determine the legality of proposed bank mergers, immunizing all mergers approved by the agencies from the direct operation of the antitrust laws. Senator Proxmire proposed an amendment eliminating the immunity provision while

[16] The Court stated that Congress in Section 7 had "proscribed anticompetitive mergers, the benign and malignant alike", and that "a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial." 374 U.S. at 371.

[17] The Court had, however, in its opinion expressly left open the possibility that in a Section 7 case involving bank mergers special defenses "in order to avert unsound banking conditions" might be recognized. 374 U.S. at 372, n. 46.

[18] Some felt, too, that it would be unfair to subject these mergers to divestiture for, it was argued, this Court's decision in *Philadelphia Bank* holding Section 7 of the Clayton Act applicable to bank mergers had been unforeseen.

excusing particular defendants from antitrust prosecutions (see S. Rep. No. 299, 89th Cong., 1st Sess.). The amendment was accepted and the Robertson-Proxmire bill passed the Senate. However, it was not accepted by the House Banking Committee.

Numerous substitute bills were considered by that committee. Some provided (like Senator Robertson's original bill) for a broad antitrust immunity (*e.g.*, H.R. 7563, 89th Cong., 1st Sess.); another that the antitrust court should review the banking agency's decision in the same manner that the decisions of administrative agencies generally are reviewed (H.R. 11011, 89th Cong., 1st Sess.); and another that the court should review all issues "de novo" (H.R. 12173, 89th Cong., 2d Sess.). The Attorney General made clear his view that all issues considered by the banking agency should be tried in court:

> I am opposed to particular procedures set forth in HR. 11011. The bill provides for review in a court of appeals on the basis of a "record" upon which the order complained of was entered, and further provides that on review the findings of the agency as to the facts, if supported by substantial evidence, shall be conclusive. This type of review is normally used for determinations by such agencies as the Federal Power Commission and the Federal Trade Commission who, pursuant to the Administrative Procedure Act, have held full public adversary hearings on a public record, with full opportunities to all parties to develop evidence as to rebut evidence produced by the others. No such procedures for the full development of a record are provided for by the Bank Merger

Act or by any current proposal, and indeed there are important considerations that make the more summary handling of merger applications particularly appropriate. Since the vast majority of applications raise no serious problems of an antitrust nature, there would seem to be little point in subjecting all merger applications before the regulatory authorities to all of the requirements of the Administrative Procedure Act in order to lay the groundwork for court review in those few instances where serious questions of competition are presented.[19]

The Attorney General also sent the Committee a draft of a bill, designed to carry out his recommendations, which provided that in an antitrust action "the court shall review de novo the issues presented." See H. Rep. No. 1221, 89th Cong., 2d Sess., p. 18.

The House Committee eventually agreed upon a compromise, which Congress approved as the Bank Merger Act of 1966. The disputed points were resolved as follows:

(1) Three of the six bank mergers mentioned in the Senate bill were forgiven.

(2) A competitive standard much stronger than that of the 1960 Bank Merger Act was imposed on the banking agencies. In effect, they were forbidden to approve any merger having the adverse competitive effects specified in Section 7 of the Clayton Act unless these effects were clearly outweighed by considerations of community convenience and needs.

[19] Letter to Congressman Wright Patman, Chairman, House Banking and Currency Committee, from Nicholas deB. Katzenbach, Attorney General, dated September 24, 1965, H. Rep. No. 1221, 89th Cong., 2d Sess., p. 9.

This standard "makes the competitive factor preeminent,"[20] thereby curing the major deficiency of the Bank Merger Act of 1960 (see pp. 25–28, *supra*), but at the same time modifies the Clayton Act standard to allow some mergers that might be forbidden by strict application of that statute—this in order to permit the consideration of possible special banking factors (see pp. 43–45, *infra*).

(3) The identical standard was made applicable to antitrust suits challenging approved mergers, so as to adapt Section 7 of the Clayton Act to the special problems of the banking industry. This solution was chosen in place of proposals that would have granted approved mergers antitrust immunity as well as proposals that would have transformed the antitrust proceeding from an independent adjudication of legality to a review of the banking agency's determination. Those proposals were rejected, and the language suggested by the Attorney General to assure independent judicial application of the new legal standard—"the court shall review *de novo the issues presented*" (emphasis added)—adopted *in haec verba*.

[20] See 112 Cong. Rec. (daily ed.) 2334 (remarks of Rep. Patman). Representative Patman also said (112 Cong. Rec. (daily ed.) 2333):

> This standard gives primary emphasis to the competitive factors in bank merger cases. It allows the competitive factor to be overridden only in those cases where it is established by the proponents of the merger that the convenience and needs of the community to be served by the merger clearly outweighs in the public interest the resulting diminution of competition.

See, also, 112 Cong. Rec. (daily ed.) 2335 (remarks of Rep. Widnall), 2340 (remarks of Rep. Moorhead), 2342 (remarks of Reps. Weltner, Halpern, and Brock), 2344 (remarks of Rep. Minish).

2. The history of the 1966 Act thus affords no basis for an inference that Congress proposed deference to the banking agencies' determinations in antitrust suits involving approved bank mergers. The basic thrust of the Act was to harmonize the roles of the banking agency and the antitrust court, not, however, by limiting the court to a review of the agency's findings, but by formulating a uniform standard—more rigorously competitive than that of the 1960 Bank Merger Act but less rigorous than Section 7 of the Clayton Act—applicable to administrative and judicial proceeding alike.

We stress also the affirmative indications that Congress intended the courts to make an independent determination whether a challenged merger was consistent with the substantive standard of the new Act.

(1) The Act does not purport to create any judicial proceeding for the review of the decision of a federal banking agency to approve a merger. The only judicial proceedings mentioned in the Act are suits brought under the antitrust laws to challenge the legality of approved mergers. The antitrust laws have never been regarded as a vehicle for the review of administrative decisions. Antitrust suits are authorized by Section 4 of the Sherman Act and Section 15 of the Clayton Act "to prevent and restrain violations" of those Acts. They are proceedings to determine the legality of challenged conduct—not the lawfulness of agency orders. Hence, /n antitrust actions involving regulated industries, courts have consistently determined the legality of mergers without giving any presumptive weight to a prior agency decision. See *United States* v. *Radio*

Corporation of America, 358 U.S. 334; *United States* v. *El Paso Natural Gas Co.,* 376 U.S. 651; *California* v. *Federal Power Commission,* 369 U.S. 482. In *Philadelphia Bank,* as we have seen (see p. 28, *supra*) (and likewise in the *Lexington Bank* case, *supra*), this Court gave no special weight to the banking agencies' views. Nothing in the 1966 Act evinces an intent to change this approach.

(2) The Act provides that in any antitrust action involving an approved bank merger "the standards applied by the court shall be identical with those that the banking agencies are directed to apply." Thus the court, like the agency, must determine whether a challenged merger's adverse competitive effects (if substantial) are clearly outweighed by considerations of community convenience and need—not whether the agency's application of the standard is supported by substantial evidence. The latter, a review standard, would be a different—not an identical—standard. Where the court's function is to review administrative action rather than to make independent determinations of liability, court and agency follow different standards. The agency's is whether in fact the law has been violated; the court's is whether the agency's decision is rational, in accordance with law, and supported by substantial evidence—regardless of whether the court as an original matter would have reached the same result. See *Woodby* v. *Immigration and Naturalization Service,* Nos. 40 and 80, this Term, 87 Sup. Ct. 483, 486; cf. Jaffe, *Administrative Law: Burden of Proof and Scope of Review,* 79 Harv. L. Rev. 914 (1966).

(3) The Act provides that the court in an antitrust action "shall review de novo the issues presented." The use of the words "de novo" strongly indicates that the court should make an independent determination of the issues.[21] We stress that the provision speaks of review not of the agency's *decision* but of the *issues*. The use of the word "review" rather than "trial" has no signficance. The terms "trial de novo" and "review de novo" can be used interchangeably. See *e.g.*, *Floyd* v. *Department of Labor & Industries*, 44 Wash. 560, 567, 269 P. 2d 563, 566 (1954); 4 Davis, *Administrative Law Treatise* (1958), p. 152. "[R]eview de novo of the issues presented" was the very language proposed by the Attorney General, who stressed to Congress his belief that this formulation would require independent judicial determination of the legality of a challenged merger, in sharp contrast to the limited judicial review of, for example, orders of the Interstate Commerce Commission (see pp. 30–31, *supra*). Congress manifestly understood the expression the same way. Representative Reuss, who drafted many of the Act's key provisions, stated (112 Cong. Rec. (daily ed.) 2338):

> I would also like to emphasize that this bill makes the courts the complete and final arbiter of whether a bank merger should be approved under the standard established by this legisla-

[21] See, *e.g.*, *Horton* v. *Liberty Mut. Ins. Co.*, 367 U.S. 348; *Louisville & Jefferson County Planning & Zoning Comm'n* v. *Grady*, 273 S.W. 2d 563 (Ky.); 4 Davis, *Administrative Law Treatise* (1958), p. 152; Jaffe, *Judicial Control of Administrative Action* (1965), pp. 619–620; but see *e.g.*, *DeMond* v. *Liquor Cont. Comm'n*, 129 Conn. 642, 30 A. 2d 547; *Fire Dept.* v. *City of Forth Worth*, 147 Tex. 505, 217 S.W. 2d 664.

tion. This is accomplished by providing for de novo review in a Federal court of any bank merger approved by a bank supervisory agency and challenged in the courts by the Justice Department. In such a case, the court shall determine independently of the decision of the supervisory agency, on the evidence presented to it, whether the proposed merger violates the standard established in paragraph (5) of this bill."

Representative Patman, the chairman of the House Committee that drafted the Act, stated that the reason for specifically providing that an antitrust court would "review de novo the issues presented" was to make clear that the court would "completely and on its own make a determination as to whether the challenged bank merger should be approved under the standard set forth in paragraph 5(b) of the bill." He added that the "court is not to give any special weight to the determination of the bank supervisory agency on this issue." 112 Cong. Rec. (daily ed.) 2335. Representative Multer also pointed out that "the court is in no way bound by the finding of the nonjudicial supervisory agency." 112 Cong. Rec. (daily ed.) 2353. This was virtually the unanimous view of Congress. See 112 Cong. Rec. (daily ed.) 2339, 2343, 2538.[22]

[22] The only contrary statements that our research discloses consist of a remark by Senator Holland (who had no particular responsibility for the bill) that it "will give greater weight to the finding of the regulating agency without making that final in the event some bad mistake is made" (112 Cong. Rec. (daily ed.) 2550) and a somewhat ambiguous colloquy between Senators Javits and Hart (112 Cong. Rec. (daily ed.) 2548).

(4) To deem the court bound by the agency's decision if it is supported by substantial evidence would be tantamount to saying that Congress repealed the antitrust laws insofar as they apply to bank mergers. For one need not invoke those laws to challenge a banking agency's merger decision merely as arbitrary, capricious, or unsupported by substantial evidence. See 5 U.S.C. 702, 704 and 706; cf. *Citizens National Bank of Maplewood* v. *Saxon,* 249 F. Supp. 557 (E.D. Mo.); *First National Bank of Smithfield* v. *Saxon,* 352 F. 2d 267 (C.A. 4). "Congress, of course, did not repeal the antitrust laws in the Bank Merger Act of 1966. It expressly rejected several bills that would have done so (*e.g.,* S. 1698, 89th Cong., 1st Sess.; H.R. 8096, 89th Cong., 1st Sess.; H.R. 8208, 89th Cong., 1st Sess.). And the Act refers throughout to "antitrust" actions. This Court should not interpret the 1966 Act as if it effected such a repeal for "[i]mmunity from the antitrust laws is not lightly implied." *California* v. *Federal Power Commission,* 369 U.S. 482, 485.

(5) Congress well knew—the point had been made in both the *Philadelphia Bank* opinion and in the Attorney General's second letter to Congress (see pp. 30–31, *supra*)—that the agencies did not conduct hearings on merger applications. The Bank Merger Act of 1960 contained no provision for a hearing and, as the Attorney General explained, there were good reasons for the agencies' informal practice in this regard. Cf. Jaffe, *Judicial Control of Administrative Action* (1965), pp. 103, 621. It would be a curious result to accord presumptive validity to a decision made without a hearing. Had Congress intended such weight to be given in a subsequent antitrust proceeding it

would, therefore, surely have provided for agency hearings in the 1966 Act. It did not.

(6) The same Congress that passed the 1966 Bank Merger Act also passed the 1966 Bank Holding Company Act, which requires district courts in any antitrust suit to "review de novo the issues presented" (12 U.S.C.A. 1849(b)), while at the same time permitting a person aggrieved to appeal the banking agency's determination directly to a court of appeals which is to apply the traditional substantial evidence standard of review of administrative action (12 U.S.C.A. 1848). Thus Congress clearly distinguished between the two types of judicial proceeding in a contemporaneously enacted statute that is *in pari materia* with the Bank Merger Act.

In arguing that Congress intended the courts in antitrust actions involving approved bank mergers to accord no special weight to the agency's action but rather to make their own independent determination of the merger's consistency with the standard prescribed in the Bank Merger Act of 1966, we do not contend that the agency's findings and decision are entitled to no weight at all. If the agency's opinion is cogent and persuasive, doubtless the defendant banks, and the banking agency if it exercises its right to intervene, will place great reliance upon it in arguing that the merger should be allowed, and the court will give careful consideration to the agency's views in arriving at its decision. Our only point is that, under the statute, the responsbility for determining the legality of the merger under the antitrust laws as modified by the new Bank Merger Act remains the

court's. The court may not abdicate that responsibility by limiting its consideration of the issues to ascertaining whether the agency's determination is supported by substantial evidence. The court must determine whether, in its judgment, the merger is in fact legal regardless of the agency's view. That was the practice under the former Bank Merger Act and Congress intended no change.

B. THE LEGAL STANDARD PRESCRIBED BY THE BANK MERGER ACT OF 1966 IS ONE THAT THE COURTS ARE FULLY COMPETENT TO APPLY. THEREFORE, NO CONSTITUTIONAL PROBLEM IS PRESENTED BY THEIR MAKING AN INDEPENDENT JUDGMENT

We have shown that the plain design of the Bank Merger Act is that the district court in an antitrust action involving a bank merger shall make an independent judgment whether the merger's anticompetitive impact (if substantial by customary Section 7 standards) is clearly outweighed by the merger's probable effect in meeting the convenience and needs of the community, according no special weight to (albeit not ignoring) the banking agency's view. It is argued, however, that a balancing judgment of this nature is not one that courts are equipped to make, and indeed that serious constitutional problems can be avoided only by interpreting the statute as entrusting the balancing task exclusively to the banking agencies, with the courts relegated to the limited role they ordinarily occupy in the review of administrative decisions. We disagree. The standard is not too broad or vague for the courts to apply in sound and sensible fashion. Nor is the balancing process required by the standard one that the banking agen-

cies are better equipped to perform that the federal district courts. There is accordingly no basis for torturing the statutory scheme to give primacy to the agency's determination.

1. It is hardly necessary to point out that the federal courts are frequently called upon to apply rather general statutory standards—such as whether a "threatened or actual strike or lockout * * * if permitted to occur or to continue will imperil the national health or safety." 29 U.S.C. 178; see *United Steelworkers* v. *United States,* 361 U.S. 39. Indeed, we need look no further than the antitrust field itself for examples of broad and general standards which allow the court great latitude in interpretation. Chief Justice Hughes' famous description of the Sherman Act as having "a generality and adaptability comparable to that found to be desirable in constitutional provisions" comes immediately to mind. *Appalachian Coals, Inc.* v. *United States,* 288 U.S. 344, 360. His opinion goes on to explain that the Act "does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape. * * * Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness." *Ibid.* This "rule of reason" has not been thought too broad or vague to be judicially applied, though it may frequently involve a weighing of competing considerations—*e.g.,* some restriction on competition against market improvements claimed to be effected by the challenged

practice. See *Chicago Board of Trade* v. *United States*, 246 U.S. 231.

Even in applying the Clayton Act—where Congress seemingly made competitive effect the sole standard of legality—the courts have on occasion balanced competitive restrictions against countervailing economic factors. For example, in *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 334, this Court distinguished requirements contracts from tying arrangements on the basis of the greater economic justification for the former, though competition is foreclosed in either event. In *United States* v. *Philadelphia National Bank*, 374 U.S. 321, the Court made clear that in a bank-merger case Section 7 of the Clayton Act "does not exclude defenses based on dangers to liquidity or solvency, if to avert them a merger is necessary." 374 U.S. at 371–372. It explained that "[t]hus, arguably, the so-called failing-company defense * * * might have somewhat larger contours as applied to bank mergers because of the greater public impact of a bank failure compared with ordinary business failures," and the Court expressly left open the possibility of "defenses * * * [which] must be allowed in order to avert unsound banking conditions" (*id.* at 372, n. 46).

It is true that the Court in *Philadelphia Bank* expressly declined to consider whether, "on some ultimate reckoning of social or economic debits and credits," the merger might be "deemed beneficial," observing that "[a] value choice of such magnitude is beyond the ordinary limits of judicial competence" *ibid.*). It is clear, however, that the Bank Merger

Act of 1966 contemplates no such free-wheeling value judgment. This emerges from a consideration of the steps that must be followed in applying the standard of the Act to a particular case.

(1) The first determination the court must make is whether the challenged merger's "effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade * * *." In essence, of course, this is merely the familiar standard of the Clayton Act—one the courts are practiced in applying. See, further, pp. 49–52, *infra*.

(2) If such an effect is found, the court must next consider "the probable effect of the transaction in meeting the convenience and needs of the community to be served." Superficially, this might appear to invite an unchanneled inquiry into all phases of the merger's possible impact. However, additional language in the statute—which requires the tribunal specifically to "take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions"—and the legislative history indicate that a much more narrow and focused inquiry was intended. It is clear, for example, that Congress' primary concern in establishing a convenience and needs defense was with the problem of the "floundering" bank—a bank not yet insolvent or in imminent danger of failure, but, by reason of poor financial condition, unable to render adequate service to the community. The House Report stressed—almost to the exclusion of any other

factor—the felt inability of traditional antitrust concepts to deal "with the floundering bank problem in medium to smaller sized communities. The problem arises where there is a relatively small number of banks, and one or more of these banks appear to be stagnating," perhaps "because it is below the economic minimum size to attract capable and vigorous management personnel" or "closely held by owners who insist on unrealistically conservative policies * * *" (p. 3). Almost all the comments in the floor debates on the convenience and needs provision likewise emphasized the problem of the floundering or stagnant bank. See 112 Cong. Rec. (daily ed.) 2335 ("declining institution"), 2336 ("casualties" of "free and open competition"), 2338 (bank "in difficulty—say with regard to a problem of management succession"), 2345 ("failing" bank), 2350, 2351 ("what can happen in the community when the bank goes bad"), 2352–2353, 2540, 2545. In view of the experience of the federal courts both in bankruptcy matters and in the application of the failing-company doctrine in antitrust merger cases (see, *e.g.*, *International Shoe Co.* v. *Federal Trade Commission*. 260 U.S. 291; *United States* v. *Diebold, Inc.*, 369 U.S. 654), it cannot tenably be maintained that those courts are incapable of appraising a claim that a bank is floundering or stagnating.

Coping with the floundering-bank problem was unquestionably envisaged as the principal function of the convenience and needs defense. Congress may also have wished to permit the courts, where excep-

tional circumstances so warrant, to consider "conditions in [a] regional or national market * * * insofar as they affect the convenience and needs of the community to be served." 112 Cong. Rec. (daily ed.) 2350; see *id.* at 2338; House Report, p. 3. Some businesses in the community may be large enough to obtain banking services from banks in other communities. A merger might conceivably increase competition for this class of customer—the purchasers in the regional or national market. This is a competitive factor that the courts are fully competent to appraise. See *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 357–362; cf. *United States* v. *Pabst Brewing Co.,* 384 U.S. 546.

Finally, there are some indications that under the new standard it may be appropriate in exceptional cases to consider the effect of a challenged merger in bringing to the community a new and important banking service (see 112 Cong. Rec. (daily ed.) 2541, 2545)—although it is quite clear that Congress did not envisage that ordinary innovations in service (*e.g.,* credit cards or Christmas clubs) would be regarded as a basis for pleading the convenience and needs defense. See 112 Cong. Rec. (daily ed.) 2340, 2350. We see nothing beyond the limits of judicial competence in a determination whether a claimed improvement in banking service is in fact new and important.

(3) Once the court has determined whether the merger will in fact produce any benefits within the scope of the convenience and needs defense, it must next consider whether the challenged merger is neces-

sary to achieve them. If, for example, a management problem that has led to bank stagnation can be resolved by some other, less anticompetitive means, plainly there is no reason to tolerate a merger that is likely to lessen competition substantially. Only those benefits need be weighed which require the challenged merger. Such a determination is required in "failing company" cases. See p. 52, *infra*. It is one that the courts are surely equipped to make.

(4) Only after appraising the claimed benefits of the merger will the court be prepared to perform the ultimate act of judgment required by the Bank Merger Act—that of weighing the competitive harms of the challenged merger against considerations of community convenience and need. In many cases, balancing these factors will be difficult. But Congress has not left the courts to perform the balancing act wholly at large. The Act provides that a merger which violates the competitive standard of the Clayton Act is to be excused only if its competitive effects are *clearly* outweighed by convenience and needs factors. The competitive considerations are thus to be accorded primacy. See p. 32, *supra*. Only an exceptionally strong showing of convenience and needs can tip the balance in favor of permitting the merger. Moreover, as we have seen, the convenience and needs defense was not viewed by Congress as establishing a general public interest standard for testing the legality of bank mergers. Congress had in mind at most a limited number of definite factors that the courts should consider—the problem of the flounder-

ing, stagnant, or failing bank; or, if unusual circumstances obtain, the bearing of competitive effects in other markets besides that most directly affected by the transaction; and the effect of the merger in bringing new and important banking services to the community. A multitude of factors that would be relevant under a general public-interest standard—for example, the impact of the merger upon employment in the community—are clearly, we believe, beyond the intended scope of the defense. Thus, properly construed and applied, the new Bank Merger Act embodies a standard sufficiently narrow and precise as to be susceptible of effective judicial enforcement—a standard that is surely within the constitutional power of the federal courts to apply.

2. What we have said largely disposes of the contention that independent judicial determination whether a challenged merger violates the standard of the Act usurps a function constitutionally reserved to administrative agencies. It is true, of course, that Article III of the Constitution precludes the federal courts from performing legislative-type functions frequently entrusted to administrative agencies. *Keller* v. *Potomac Electric Power Co.*, 261 U.S. 428; *Federal Radio Commission* v. *General Electric Co.*, 281 U.S. 464; *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693; *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17. The classic statement of the test for distinguishing judicial from legislative power

is that of Mr. Justice Holmes, speaking for the Court in *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 226:

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. * * *

Congress, in passing the 1966 Bank Merger Act, did not give the banking agencies broad latitude to determine what bank mergers should be allowed. The agencies have no discretion to approve a proposed merger contrary to the specific standard laid down in the Act. Cases like *General Electric* and *Idaho Power, supra,* involve a discretion to adopt and to adjust from time to time basic licensing policies, and cases like *Keller, supra,* involve an expert agency's use of discretion to set rate-making policy. The Bank Merger Act of 1966 does not grant any such policy-making discretion to the banking agencies—or to the courts.

In an antitrust suit subject to the Bank Merger Act of 1966 the court is not called upon, in its discretion, to authorize a proposed merger. Its function is to decide whether the merger is legal under the standards prescribed by the Clayton and Bank Merger Acts. The suit is an ordinary judicial proceeding to adjudicate an actual controversy between two parties concerning legal rights. Cf. *Tutun* v. *United*

States, 270 U.S. 568. The Bank Merger Act refers to the proceeding as an "action brought under the antitrust laws," and it allows the banking agency concerned to "appear as a party." 12 U.S.C. 1828(c)(7)(D). The court proceeding is thus not a mere interim stage in an administrative process, as was the case in *Postum Cereal, supra.* And we have seen that the standard defining the legal rights involved is one fully susceptible of being effectively interpreted and applied by a court.

Finally, this is not a case where due "regard for the expertise of special agencies charged with performing the rate-making [or other highly specialized] function [, like licensing] and [with] inherent actual, as well as legal, disability of courts to execute that function" precludes judicial intrusion. *United States* v. *Jones,* 336 U.S. 641, 652. We submit that, in performing the ultimate judgment required by the Bank Merger Act—that of weighing competitive harms against countervailing considerations of community convenience and needs—the banking agencies are no more expert than the courts.

One-half of the equation, competitive effect—the predominant element in the test (see pp. 31–32, *supra*)—involves an area where the superior expertise would seem to reside in the courts. The competitive standard of the Act is drawn verbatim from that of Section 7 of the Clayton Act. "This language was intentionally used so as clearly to indicate * * * that the antitrust standards which have been developed

over the last 75 years on the basis of case law definition of these statutory provisions are intended to be incorporated in the application of the proposed act." 112 Cong. Rec. (daily ed.) 2337 (remarks of Representative Reuss, who drafted this part of the Act); see, also *id.* at 2334 ("the competitive standard to be applied is clearly that of the Sherman and Clayton Act"). The antitrust competitive standard has been evolved by the courts (and the Federal Trade Commission)—not by the federal banking agencies.

As a matter of fact, the standards those agencies have applied in judging the competitive impact of bank mergers have often diverged widely from the judicial standard—indicating that the agencies may not be especially expert in the application of the antitrust concepts that Congress has clearly indicated constitute the predominant component of the new Bank Merger Act's legal test. We have already recounted the unhappy experience with the agencies' handling of competitive considerations in the 1960 Bank Merger Act—an experience that was one of the factors leading to the 1966 amendments. See pp. 27-28, *supra.* Another example of the disparity in the judicial and administrative competitive standards may be found in the fact that the banking agencies, in striking contrast to this Court, do not seem to view increases in concentration as particularly significant from a competitive standpoint. In reporting on the Fidelity-Baltimore National Bank-Maryland Trust Co. merger, the Comptroller of the Currency stated:

> By this consolidation there was eliminated 1 of 14 competitors, 1 of 20 competitors with savings banks included, in the Baltimore area; and there resulted an increase in size of 1 competitor from 21 to 29 percent of total resources among commercial banks and from 15 to 20 percent of total resources among commercial and savings banks. * * * Other competitors range from 17 to 11 percent of commercial bank resources and from 13 to 7 percent of commercial and savings bank resources. It appears clear that there would be no tendency toward monopoly. [Annual Report of the Comptroller of the Currency, 1960, p. 54.]

Similarly, the Comptroller's report on the *Philadelphia National Bank* merger had stated:

> With respect to local competition there would be eliminated an important competitor, but there would remain in the entire area 46 banks, and in the City of Philadelphia alone 16 commercial and 4 savings banks. Of these 7 commercial banks have assets in excess of $100 million and all of the savings banks are in this category. Thus the consolidation will not deprive the public or the small businesses in Philadelphia of an adequate number of alternative sources of banking service.
>
> Since there will remain an adequate number of alternative sources of banking service in Philadelphia, and in view of the beneficial effects of this consolidation upon international and national competition it was concluded that the over-all effect upon competition would not be unfavorable. [Record, *United States v. Phil-*

adelphia National Bank, 374 U.S. 321, No. 83, O.T. 1962, p. 2861.]

Moreover, the Comptroller has disregarded the admonition of this Court in *Philadelphia Bank* that "the cluster of products * * * and services * * * denoted by the term 'commercial banking' * * * composes a distinct line of commerce." *United States* v. *Philadelphia National Bank, supra,* at 356. In his opinion approving the merger of the two Philadelphia banks involved in No. 972, the Comptroller wrote:

> Henceforth, the competitive impact of a bank merger must be asessed in the light of savings banks, insurance companies, savings and loan associations, credit unions, finance companies, small loan companies, factors, and even department stores and mail order houses, that compete for the credit lines or the savings dollar of the public." [J.S. 972, App. C, p. 32.]

And in his report on the merger involved in No. 914, the Comptroller wrote:

> We view the appropriate product market to include all financial institutions doing business [in the area] * * *. As of December 31, 1963, there were 115 commercial banks * * *. 20 savings and loan institutions * * *, some 240 credit unions * * *, 3 large mortgage placement companies, many small loan and finance companies and a large number of local and national insurance companies, to say nothing of the Federal government's direct lending agencies * * *. [App. C, *infra,* pp. 94-95.]

Consider also the following example. This Court has indicated that, in evaluating the claim that a

merger is permissible under the "failing company" doctrine, the availability of other purchasers whose acquisition of the company would not involve the same anticompetitive consequences is pertinent. See *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655; *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291, 302. See, also, Hearings Pursuant to S. Res. 61 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 84th Cong., 1st Sess., Pt. 1, p. 326; *Report of the Attorney General's National Commi*ttee *to Study the Antitrust Laws*, p. 123 (1955). Yet the banking agencies have consistently allowed competing banks to merge on the ground that one is in "failing" or "floundering" condition, without attempting to consider whether alternative purchasers would provide a less anticompetitive alternative to the merger proposed. See Hall and Phillips, *supra*, p. 27, n. 14, at 53, 84.

The banking agencies—which unlike other administrative bodies have no authority to immunize transactions from the antitrust laws, to regulate most of the rates of the corporations subject to their supervision or to fix rates of return [23]—have, indeed, a strictly limited sphere of expertise. They "maintain a close surveillance of the industry with a view toward preventing unsound practices that might impair liquidity or lead to insolvency." *United States* v. *Philadelphia National*

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[23] As this Court pointed out in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 352, "bank regulation is in most respects less complete than public utility regulation."

Bank, 374 U.S. 321, 352. They have no special competence or expertise in the application of antitrust standards to the banking industry—and those standards, as we have seen, are incorporated in the Bank Merger Act of 1966, albeit they do not constitute the whole of the legal test under that Act, in recognition of the high importance of competition in the banking industry.[34] On balance it would seem that the courts can perform the weighing process required by the new Bank Merger Act as knowledgeably and ra-

[34] As the Court observed in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 369-370, 372:

> There is no reason to think that concentration is less inimical to the free play of competition in banking than in other service industries. On the contrary, it is in all probability more inimical. For example, banks compete to fill the credit needs of businessmen. Small businessmen especially are, as a practical matter, confined to their locality for the satisfaction of their credit needs. * * * If the number of banks in the locality is reduced, the vigor of competition for filling the marginal small business borrower's needs is likely to diminish. At the same time, his concomitantly greater difficulty in obtaining credit is likely to put him at a disadvantage *vis-à-vis* larger business with which he competes. In this fashion, concentration in banking accelerates concentration generally.
>
> * * * * *
>
> At the price of some repetition, we note that if the businessman is denied credit because his banking alternatives have been eliminated by mergers, the whole edifice of an entrepreneurial system is threatened; if the costs of banking services and credit are allowed to become excessive by the absence of competitive pressures, virtually all costs, in our credit economy, will be affected; and unless competition is allowed to fulfill its

tionally as the banking agencies. Moreover, it is highly reasonable to require a court to make an independent, neutral adjudication of a dispute that transcends the area of responsibility of a single agency—a dispute that is likely to find the Department of Justice on one side and a banking agency on the other. Cf. 4 Davis, *op. cit. supra*, p. 232. No such neutral adjudication can be made if the court must accord *prima facie* weight to the views of one of the disputing parties. Surely, therefore, neither the Constitution nor sound general principles of administrative law require that the judgment of the agency be accorded presumptive validity and the role of the courts reduced—contrary to the purpose and the text of the Bank Merger Act—to that of affording a limited judicial review of the agency's application of the statutory standard.

III

THE COURTS BELOW DISSOLVED THE AUTOMATIC STATUTORY STAY INCIDENTALLY TO DISMISSING THE GOVERNMENT'S COMPLAINT. IF THIS COURT REVERSES THE JUDGMENTS OF DISMISSAL THE STATUTORY STAY WILL REVIVE BY OPERATION OF LAW [25]

The Bank Merger Act of 1966 provides that the commencement of an antitrust action within the

role as an economic regulator in the banking industry, the result may well be even more governmental regulation.

See, also, Edwards, *The Banking Competition Controversy*, National Banking Review, Sept. 1965, p. 1.

[25] The points argued in this part of our brief are, we believe, comprehended within the reserved question in the jurisdictional statements. J.S. 914, p. 2, n. 1; J.S. 972, p. 2, n. 1. See note 26, *infra*, p. 59.

thirty-day period following the banking agency's approval during which consummation of the transaction is forbidden (12 U.S.C. 1828(c)(6)) "shall stay the effectiveness of the agency's approval [and hence consummation of the merger] unless the court shall otherwise specifically order." 12 U.S.C. 1828(c)(7)(A). Both courts below dissolved the statutory stay upon dismissing the government's complaint. They gave no reason for their action. Doubtless they assumed that by dismissing the complaint they were terminating the litigation and thereby obviating any occasion for a continued stay of the challenged transaction. The question therefore arises whether, assuming this Court reverses the judgments of dismissal, the dissolution of the stay falls with the judgment and the stay revives automatically; or whether a further order by the district court imposing a stay is necessary. We think the former. To avert uncertainty and to provide guidance in the subsequent stages of the litigation, this Court could appropriately, we believe, so indicate in its instructions remanding the cases—and perhaps, in addition, adumbrate in brief the standards that should govern any possible future attempts in the litigation to dissolve the statutory stay.

A.

The stay provided for in the statute arises by operation of law upon the commencement of the antitrust suit. No order of the court is required. Consequently, the burden is not on the government to establish entitlement to a stay, but on the defendant banks to show that the stay should be dissolved. In a case,

like these cases, where the district judge orders the stay dissolved because he is dismissing the complaint, and it later turn out that the dismissal was erroneous, the order should, in our view, be given no further effect in the proceeding. A dissolution order premised on a legal error surely affords no basis for shifting to the government the burden of showing that a stay should be granted. The order falls with the judgment when the judgment is reversed, and the statutory stay is automatically revived, to be dissolved only if the defendant banks can persuade the district court to exercise its discretion to lift the stay.

The principle we urge is necessary to fulfill the clear policy of the Bank Merger Act that—save in extraordinary instances—the legality of a bank merger should be determined before, not after, it is consummated. The Act is captioned an act "[t]o establish a procedure for the review of proposed bank mergers so as to eliminate the necessity for the dissolution of merged banks * * *." Section 2(a) of the Act forgives a number of bank mergers, adjudged unlawful under the antitrust laws, where the merger had been consummated but divestiture had not yet been effected. Under Section 2(b), an antitrust suit may not be brought that challenges any merger consummated before the enactment of the Act. And, as noted, bank mergers may not be consummated until thirty days after approval by the banking agency in order to enable the Attorney General to commence an antitrust suit (which must be brought within the 30-day period) before consummation.

These provisions—and, most pointedly of all, that which provides for an automatic stay of the merger upon commencement of an antitrust suit—reflect a strong congressional belief that it is most often both impractical, and harmful to the public, to attempt to undo a consummated bank merger. The Chairman of the Federal Reserve System testified in the hearings that preceded enactment of the Bank Merger Act of 1966 that "[a] Federal court order cannot recreate the two banks that formerly existed. * * * No matter how one may feel about whether the merger should have taken place in the first instance, there is no turning back. To unscramble the resulting bank clearly poses serious problems not only for the banks but for its customers and for the community." Hearings on S. 1698 and related bills before a Subcommittee of the House Committee on Banking and Currency, 89th Con., 1st Sess., p. 11. The President of the American Bankers Association declared that "'unmerging' a bank after the two banks have operated as a single unit is nightmarish even in the abstract." Hearings on S. 1698 before a Subcommittee of the Senate Committee on Banking and Currency, 89th Cong., 1st Sess., p. 63. Senator Robertson stated, "[y]ou are dealing with a physical impossibility," and "the community gets hurt," when divestiture is attempted in a bank merger case. *Id.*, p. 4. Senator Proxmire spoke of "the agony and the inequity and the financial loss, disruption of the economy in the community of being required * * * to unscramble." *Id.*, p. 202. To like effect, see, *e.g.*, *id.*, pp. 12, 13, 26, 67, 76–77, 83, 92, 202, 206; House Hearings, *supra*, p.

143; H. Rep. No. 1221, 89th Cong., 2d Sess., pp. 31–32 (views of Congressman Todd).

Difficulties in unscrambling consummated mergers are of course not confined to the banking area. See *Federal Trade Commission* v. *Dean Foods Co.,* 384 U.S. 597. But they are especially acute in banking because complex financial relations, not merely physical products, are involved. A few examples will suggest why.

(1) Under the National Bank Act, 12 U.S.C. 215a(e), in a merger all of the trust accounts of the acquired bank vest automatically in the acquiring bank. In the event of divestiture, restoration of the acquired bank as trustee of any such account would require an order from a State court. See 12 U.S.C. 215a(f).

(2) A bank merger results in a higher legal lending limit for single loans for the resulting bank. See 12 U.S.C. 84. If divestiture is decreed the banks might find themselves holding loans in excess of their legal limits, and might be compelled to call them.

(3) All loans and deposits subsequent to the merger would, at divestiture, have to be divided between the merged banks. This would of necessity be a rather arbitrary division. More seriously, it is widely believed in banking circles that, when invited to choose between the merger partners in a divestiture situation, many depositors are likely to take their money elsewhere. See, *e.g.,* Senate Hearings, *supra,* p. 64.

Beyond these practical problems—which could easily be multiplied—there is the general fear that dismembering a bank is likely to undermine public

confidence in the bank, and thereby imperil its solvency and the welfare of the businessmen and individuals who depend on the bank for credit or who have deposited money with it—with resulting harms community-wide in their impact.

We do not suggest that these difficulties are always insoluble. It is enough to note that they pose a formidable obstacle to fashioning an effective remedy in antitrust cases involving bank mergers whose consummation has been allowed, and that Congress included the automatic-stay provision in the 1966 Bank Merger Act precisely in order to forestall the necessity for divestiture. It would seem to follow that only in the rare case should consummation be permitted during the pendency of the antitrust suit.[36] Where the district judge disolves the statutory stay incidentally to granting a motion to dismiss the suit, but the stay is continued in effect by the appellate court, manifestly consummation should not be permitted to follow upon *reversal* of his judgment of dismissal—which robs the dissolution order of its only (albeit, in our view, inadequate (see note 27))

[36] Thus, we believe the district courts below clearly erred in dissolving the statutory stay for the sole reason (so for as appears) that they were ordering dismissal of the government's complaints. Dismissing the complaints did not terminate the litigation. The government had—and exercised—its right of direct appeal to this Court. This Court's action in noting probable jurisdiction in both cases indicates that the government's appeals were not frivolous. In addition, this Court (in No. 914) and a justice of the Court (in No. 972) granted the government's applications for stays pending appeal. These stay proceedings would have been unnecessary had the courts below, consistent with the intent of the automatic-stay provision, continued the statutory stay in effect pending the appeals.

justification. Nor should the government be put to the burden of establishing its entitlement to the stay. That would be contrary to the statutory scheme. The proper rule, we submit, is that the order dissolving the stay falls with the judgment of dismissal on which it depended and the statutory stay revives automatically.

B.

On remand, to be sure, the district court may entertain a motion by the defendant banks to dissolve the statutory stay while the litigation proceeds. As reported out of the Senate committee, the bill proposing the new Bank Merger Act provided for an automatic stay "until after the termination of" the antitrust suit. See S. Rep. No. 299, 89th Cong., 1st Sess., p. 3. The House amended the bill to add the language which appears in the enacted legislation empowering the district court to dissolve the statutory stay. It was feared that the Senate bill "gave the Justice Department an absolute veto over bank mergers," and that to prevent a merger "[a]ll the Department would have to do would be to file a mimeographed complaint" (112 Cong. Rec. (daily ed.) 2539 (remarks of Senator Robertson)). The stay provision was amended to allow consummation when it is clear that plaintiff cannot prevail on the merits because, for example, the merger is necessary to avert an imminent failure. It still "provides for postponement of the merger as the usual rule." *Ibid.* Therefore, we submit, only in such an exceptional case may the

district court properly exercise its discretion to dissolve the statutory stay during the proceeding.

The burden on defendant banks seeking a dissolution is, accordingly, a heavy one. Certainly, nothing that the defendants in the present cases have yet submitted would justify the district courts, on remand, in dissolving the statutory stay. In No. 914 (the *Houston* case), defendant banks have not argued that the government cannot ultimately prevail on the merits of its antitrust case, or that prompt consummation is necessary to avert a failing situation. They say that they have represented in open court that they have contemplated the risk of divestiture and, if they merge, would be prepared to face those risks. But the risks with which Congress was concerned were risks to the public—not to the merger applicants. Moreover, as Congress was well aware (see, *e.g.*, H. Rep. No. 1221, 89th Cong., 2d Sess., pp. 31–32 (views of Congressman Todd)), attorneys for the defendants in the three bank merger cases specifically mentioned by Congress in the Bank Merger Act of 1966 all had made statements in open court similar to, if not stronger than, the statements made by defendants' attorneys in this case concerning their willingness to risk divestiture. Yet Congress believed divestiture would work such hardship to the communities involved that it included as Section 2(a) of the 1966 Act a provision conclusively presuming that those mergers had not violated the antitrust laws (other than Section 2 of the Sherman Act). As the

Chairman of the Federal Reserve System observed in the hearings, "with due respect to the lawyers—I don't know that we should bail out the lawyers on this; but I think that from any point of view the affairs of stockholders and depositors and trust accounts, particularly are very difficult to unscramble after it is already done. I think the lawyers may have made a mistake in having made that statement * * *." House Hearings, p. 143.

In No. 972 (the *Provident* case), the defendant banks make three arguments against any further stay in the consummation of their merger. The first is that delay will be harmful to them. They do not suggest, however, that their fears in this regard are based on any new developments or changed circumstances since they obtained the approval of the Comptroller of the Currency for their merger. And at that time they were advised by the Department of Justice that this antitrust suit—which would automatically stay consummation of the merger—was probable. They knowingly ran the risk of being unable to consummate the merger until its legality was finally decided in the courts; they have no right to complain if—as they must have anticipated—the stay is in fact continued throughout the litigation.

While conceding "the futility of any effort at demerging the Banks two years hence" (memorandum in opposition to the government's stay application in this Court, p. 14), the banks argue that although the acquired bank could not be reconstituted as a viable concern if consummation of the merger were permitted, effective relief would still be possible—be-

cause the branches of the acquired bank could, perhaps, be sold. Parceling out the acquired bank's branches among several other banks is, however, not the equivalent of divestiture of the acquired bank, and is hardly likely to restore the competition eliminated by the merger. Not only would such a remedy leave the acquiring bank in control of much of the acquired bank's business, but it is pure conjecture that the branches could be sold, as the banks hypothesize, in such fashion as to facilitate the entry of one or more banks of the same competitive strength as the acquired bank. The normal remedy in a merger case is divestiture of the acquired firm *as a going concern;* defendants candidly admit that such a solution will be impossible if consummation of the merger is permitted.

Nor is there any merit to the suggestion that the government is unlikely to prevail on the merits of its complaint because the defendant banks have already produced evidence that the merger is necessary to meet the convenience and needs of the community, and the government has not attempted to rebut it. In its pre-trial reply brief (reproduced as an appendix to the defendant banks' memorandum in opposition to the stay), the government made clear that it was "not in a position to inform" the trial court whether it accepted defendants' allegations with respect to convenience and needs, because defendants had not furnished "any source for the facts upon which" the allegations were based (p. 12). The first pre-trial order (also appended to the memorandum in opposition) likewise makes clear that the government may

raise such additional factual issues as discovery may disclose (pp. 2–3). The defendants' case on convenience and needs is far from being conceded by the government.

In practical terms of effective antitrust enforcement in the bank merger area, no question is more important than the standards governing stays *pendente lite*. We recognize that under the Expediting Act this Court is rarely a proper forum for the decision of such questions. *United States* v. *FMC Corp.,* 11 L. Ed. 2d 20 (opinion of Mr. Justice Goldberg in chambers). Here, however, the district courts' rulings on the continuation ~~of the~~ statutory stay are embodied in their final judgments dismissing the complaint and hence are properly before the Court. Clarification is urgently needed to guide future proceedings in the present cases as well as the many others under the Bank Merger Act of 1966 that are pending or in prospect. Specifically, we ask the Court to make clear (1) that reversal of the judgment of dismissal in each of the present cases reinstates automatically the statutory stay, and (2) that the burden on the defendant banks in seeking to dissolve the stay is a heavy one and is not satisfied by the showing heretofore made by them in the present proceedings.

CONCLUSION

The judgments below should be reversed and the cases remanded for further proceedings.

Respectfully submitted.

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FEBRUARY 1967.

APPENDIX A

Statutes Involved

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Section 18(c) of the Bank Merger Act of 1966, 80 Stat. 7, 12 U.S.C.A. 1828(c), provides:

> "(c)(1) Except with the prior written approval of the responsible agency, which shall in every case referred to in this paragraph be the Corporation, no insured bank shall—
>
> "(A) merge or consolidate with any noninsured bank or institution;
>
> "(B) assume liability to pay any deposits made in, or similar liabilities of, any noninsured bank or institution;
>
> "(C) transfer assets to any noninsured bank or institution in consideration of the assumption of liabilities for any portion of the deposits made in such insured bank.
>
> "(2) No insured bank shall merge or consoli-

date with any other insured bank or, either directly or indirectly, acquire the assets of, or assume liability to pay any deposits made in, any other insured bank except with the prior written approval of the responsible agency, which shall be—

"(A) the Comptroller of the Currency if the acquiring, assuming, or resulting bank is to be a national bank or a District bank;

"(B) the Board of Governors of the Federal Reserve System if the acquiring, assuming, or resulting bank is to be a State member bank (except a District bank);

"(C) the Corporation if the acquiring, assuming, or resulting bank is to be a nonmember insured bank (except a District bank).

"(3) Notice of any proposed transaction for which approval is required under paragraph (1) or (2) (referred to hereafter in this subsection as a 'merger transaction') shall, unless the responsible agency finds that it must act immediately in order to prevent the probable failure of one of the banks involved, be published—

"(A) prior to the granting of approval of such transaction,

"(B) in a form approved by the responsible agency,

"(C) at appropriate intervals during a period at least as long as the period allowed for furnishing reports under paragraph (4) of this subsection, and

"(D) in a newspaper of general circulation in the community or communities where the main offices of the banks involved are located, or, if there is no such newspaper in any such community, then in the newspaper of general circulation published nearest thereto.

"(4) In the interest of uniform standards, before acting on any application for approval

of a merger transaction, the responsible agency, unless it finds that it must act immediately in order to prevent the probable failure of one of the banks involved, shall request reports on the competitive factors involved from the Attorney General and the other two banking agencies referred to in this subsection. The reports shall be furnished within thirty calendar days of the date on which they are requested, or within ten calendar days of such date if the requesting agency advises the Attorney General and the other two banking agencies that an emergency exists requiring expeditious action.

"(5) The responsible agency shall not approve—

"(A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

"(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

"(6) The responsible agency shall immediately notify the Attorney General of any approval by it pursuant to this subsection of a proposed merger transaction. If the agency

has found that it must act immediately to prevent the probable failure of one of the banks involved and reports on the competitive factors have been dispensed with, the transaction may be consummated immediately upon approval by the agency. If the agency has advised the Attorney General and the other two banking agencies of the existence of an emergency requiring expeditious action and has requested reports on the competitive factors within ten days, the transaction may not be consummated before the fifth calendar day after the date of approval by the agency. In all other cases, the transaction may not be consummated before the thirtieth calendar day after the date of approval by the agency.

"(7)(A) Any action brought under the antitrust laws arising out of a merger transaction shall be commenced prior to the earliest time under paragraph (6) at which a merger transaction approved under paragraph (5) might be consummated. The commencement of such an action shall stay the effectiveness of the agency's approval unless the court shall otherwise specifically order. In any such action, the court shall review de novo the issues presented.

"(B) In any judicial proceeding attacking a merger transaction approved under paragraph (5) on the ground that the merger transaction alone and of itself constituted a violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2), the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5).

"(C) Upon the consummation of a merger transaction in compliance with this subsection and after the termination of any antitrust litigation commenced within the period prescribed in this paragraph, or upon the termination of such period if no such litigation is commenced

therein, the transaction may not thereafter be attacked in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2), but nothing in this subsection shall exempt any bank resulting from a merger transaction from complying with the antitrust laws after the consummation of such transaction.

"(D) In any action brought under the antitrust laws arising out of a merger transaction approved by a Federal supervisory agency pursuant to this subsection, such agency, and any State banking supervisory agency having jurisdiction within the State involved, may appear as a party of its own motion and as of right, and be represented by its counsel.

"(8) For the purposes of this subsection, the term 'antitrust laws' means the Act of July 2, 1890 (the Sherman Antitrust Act, 15 U.S.C. 1–7), the Act of October 15, 1914 (the Clayton Act, 15 U.S.C. 12–27), and any other Acts in pari materia.

"(9) Each of the responsible agencies shall include in its annual report to the Congress a description of each merger transaction approved by it during the period covered by the report, along with the following information:

"(A) the name and total resources of each bank involved;

"(B) whether a report was submitted by the Attorney General under paragraph (4), and, if so, a summary by the Attorney General of the substance of such report; and

"(C) a statement by the responsible agency of the basis for its approval."

(b) Section 18 of such Act is further amended by adding at the end thereof the following new subsection:

"(i)(1) No insured State nonmember bank (except a District bank) shall, without the prior consent of the Corporation, reduce the amount or retire any part of its common or preferred capital stock, or retire any part of its capital notes or debentures.

"(2) No insured bank shall convert into an insured State bank if its capital stock or its surplus will be less than the capital stock or surplus, respectively, of the converting bank at the time of the shareholder's meeting approving such conversion, without the prior written consent of—

"(A) the Comptroller of the Currency if the resulting bank is to be a District bank;

"(B) the Board of Governors of the Federal Reserve System if the resulting bank is to be a State member bank (except a District bank);

"(C) the Corporation if the resulting bank is to be a State nonmember insured bank (except a District bank).

"(3) Without the prior written consent of the Corporation, no insured bank shall convert into a noninsured bank or institution.

"(4) In granting or withholding consent under this subsection, the responsible agency shall consider—

"(A) the financial history and condition of the bank,

"(B) the adequacy of its capital structure,

"(C) its future earnings prospects,

"(D) the general character of its management,

"(E) the convenience and needs of the community to be served, and

"(F) whether or not its corporate powers are consistent with the purposes of this Act."

SEC. 2. (a) Any merger, consolidation, acquisition of assets, or assumption of liabilities

involving an insured bank which was consummated prior to June 17, 1963, the bank resulting from which has not been dissolved or divided and has not effected a sale or distribution of assets and has not taken any other similar action pursuant to a final judgment under the antitrust laws prior to the enactment of this Act, shall be conclusively presumed to have not been in violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2).

(b) No merger, consolidation, acquisition of assets, or assumption of liabilities involving an insured bank which was consummated after June 16, 1963, and prior to the date of enactment of this Act and as to which no litigation was initiated by the Attorney General prior to the date of enactment of this Act may be attacked after such date in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2).

(c) Any court having pending before it on or after the date of enactment of this Act any litigation initiated under the antitrust laws by the Attorney General after June 16, 1963, with respect to the merger, consolidation, acquisition of assets, or assumption of liabilities of an insured bank consummated after June 16, 1963, shall apply the substantive rule of law set forth in section 18(c)(5) of the Federal Deposit Insurance Act, as amended by this Act.

(d) For the purposes of this section, the term "antitrust laws" means the Act of July 2, 1890 (the Sherman Antitrust Act, 15 U.S.C. 1–7), the Act of October 15, 1914 (the Clayton Act, 15 U.S.C. 12–27), and any other Acts in pari materia.

SEC. 3. Any application for approval of a merger transaction (as the term "merger transaction" is used in section 18(c) of the Federal Deposit Insurance Act) which was made before the date of enactment of this Act, but was withdrawn or abandoned as a result of any objections made or any suit brought by the Attorney General, may be reinstituted and shall be acted upon in accordance with the provisions of this Act without prejudice by such withdrawal, abandonment, objections, or judicial proceedings.

APPENDIX B

United States District Court for the Southern District of Texas (Houston Division)

Civil Action No. 66-H-695

UNITED STATES OF AMERICA, PLAINTIFF

v.

FIRST CITY NATIONAL BANK OF HOUSTON AND SOUTHERN NATIONAL BANK OF HOUSTON, DEFENDANTS

(Filed October 19, 1966)

COMPLAINT

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action to obtain equitable relief against the above-named defendants, and complains and alleges as follows:

I. JURISDICTION AND VENUE

1. This complaint is filed and this action is instituted under Section 15 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 736, as amended (15 U.S.C. § 25), commonly known as the Clayton Act, in order to prevent and restrain the violation by the defendants, as hereinafter alleged, of Section 7 of the Clayton Act, 38 Stat. 731, as amended by the Act of Congress of December 29, 1950, c. 1184, 64 Stat. 1125 (15 U.S.C. § 18).

2. Each of the defendants has its principal place of business, transacts business, and is found within the Southern District of Texas.

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II. THE DEFENDANTS

3. First City National Bank of Houston, hereinafter referred to as "First City," is made a defendant herein. First City is a national banking association organized under the laws of the United States of America, with its principal place of business in Houston, Texas.

4. Southern National Bank of Houston, hereinafter referred to as "Southern National," is made a defendant herein. Southern National is a national banking association organized under the laws of the United States of America, with its principal place of business in Houston, Texas.

III. TRADE AND COMMERCE

5. Commercial banks fill an essential and unique role in the Nation's economy. Their principal functions are the acceptance of deposits for safekeeping and convenience in making payments by check, the granting of loans or advances of funds to individuals and business firms, and the creation through demand deposits of net additions to the supply of money. Most money payments in the United States are made through checks drawn against demand deposits and the creation and holding of such deposits is a function peculiar to commercial banks and one which makes them to a great extent the administrators of the Nation's check payment system. Through the making of loans to individuals and businesses, commercial banks supply a significant part of the credit requirements of the Nation's economy. Commercial banks also accept time deposits from various types of depositors and provide a wide variety of other financial services, including personal and corporate trust accounts, the collection of drafts, bills, and other commercial instruments; the acceptance of bills of ex-

change; the issuance of letters of credit; the sale of cashier's checks, and drafts on correspondent banks; the purchase or sale of securities for customers; the sale of foreign exchange; and the renting of safety deposit boxes. This combination of services is unduplicated by other financial institutions.

6. Commercial banks, because of the importance of bank credit to business and other borrowers and the close relationship of banks with many such borrowers, and because of their holdings of stock in trust accounts, have an important influence on competition in all branches of industry and commerce served by the banking system.

7. Commercial banking in Harris County, the home county of First City and Southern National, and in the five-county area of Harris, Brazoria, Fort Bend, Liberty, and Montgomery counties (referred to hereinafter as "Houston metropolitan area") is heavily concentrated in a few banks. As of December 31, 1965, the five largest commercial banks in Harris County (all of which are located in downtown Houston) accounted for approximately 67.2% of the total assets, 66.3% of the total deposits, and 65.2% of the total loans and discounts of the 85 commercial banks located in Harris County as of that date. As of the same date, the five largest banks in the Houston metropolitan area (all of which are located in downtown Houston) accounted for approximately 64.0% of the total assets, 63.0% of the total deposits, and 62.4% of the total loans and discounts of the 115 commercial banks located in the Houston metropolitan area as of that date. In addition, many of the smaller commercial banks in Harris County and the Houston metropolitan area, including many which have been opened since 1955, are affiliated or closely associated with one or another of the large downtown

Houston banks through common stock ownership or personnel interlocks, thus further increasing concentration in commercial banking in Harris County and in the Houston metropolitan area.

8. The high degree of concentration existing in Harris County and the Houston metropolitan area is in large part a direct result of past mergers, acquisitions, and consolidations among commercial banks in the area. Four mergers since 1952 have resulted in what are at the present time the first, second and fourth ranking commercial banks in Harris County and the Houston metropolitan area.

9. First City is the product of a number of mergers, consolidations or acquisitions. The merger of City National Bank and First National Bank in 1956 resulted in First City becoming the largest commercial bank in Houston.

10. First City is the largest commercial bank in Harris County and in the Houston metropolitan area. As of December 31, 1965, First City accounted for approximately $966 million (24.3%) of the total assets, $850 million (24.6%) of the total deposits, and $426 million (19.8%) of the total loans and discounts of all commercial banks in Harris County. As of the same date, First City accounted for approximately 23.2% of the total assets, 23.4% of the total deposits, and 19.0% of the total loans and discounts of all commercial banks in the Houston metropolitan area. In addition, at least ten smaller commercial banks in Harris County with aggregate deposits of approximately $188 million are affiliated or closely associated with First City through common stock ownership or personnel interlocks. As of December 31, 1965, First City and the smaller banks affiliated or closely associated with it accounted for approximately 29.6% of the total deposits of all commercial banks in Harris

County, and approximately 28.2% of the total deposits of all commercial banks in the Houston metropolitan area.

11. Southern National is the sixth largest commercial bank in Harris County and in the Houston metropolitan area. As of December 31, 1965, Southern National accounted for approximately \$81 million (2.0%) of the total assets, \$66 million (2.1%) of the total deposits, and \$45 million (2.2%) of the total loans and discounts of all commercial banks in Harris County. As of the same date, Southern National accounted for approximately 1.9% of the total assets, 2.0% of the total deposits, and 2.1% of the total loans and discounts of all commercial banks in the Houston metropolitan area. In addition, at least two smaller commercial banks in Harris County with aggregate deposits of about \$26 million are affiliated or closely associated with Southern National through common stock ownership or personnel interlocks. As of December 31, 1965, Southern National and the smaller banks affiliated or closely associated with it accounted for approximately 2.8% of the total deposits of all commercial banks in Harris County, and approximately 2.6% of the total deposits of all commercial banks in the Houston metropolitan area.

12. If the proposed merger of First City and Southern National is consummated, the resulting bank would account for approximately 26.3% of the total assets, 26.7% of the total deposits, and 22.0% of the total loans and discounts of all commercial banks in Harris County, and approximately 25.1% of the total assets, 25.4% of the total deposits, and 21.1% of the total loans and discounts of all commercial banks in the Houston metropolitan area. In addition, the resulting bank and the approximately twelve smaller banks which are presently affiliated or closely associ-

ated with First City or Southern National would account for at least 32.4% of the total deposits of all commercial banks in Harris County, and at least 30.8% of the total deposits of all commercial banks in the Houston metropolitan area.

13. If the proposed merger of First City and Southern National is consummated, the five largest commercial banks in the Houston metropolitan area would account for approximately 69.2% of the total assets, 68.4% of the total deposits, and 67.4% of the total loans and discounts of all commercial banks in Harris County, and approximately 65.9% of the total assets, 65.0% of the total deposits, and 64.5% of the total loans and discounts of all commercial banks in the Houston metropolitan area. In addition, the five largest banks in the Houston metropolitan area and the smaller banks which are presently affiliated or closely associated with one or another of these banks would account for approximately 78.0% of the total deposits of all commercial banks in Harris County, and approximately 74.0% of the total deposits of all commercial banks in the Houston metropolitan area.

14. First City and Southern National compete with each other and with other commercial banks in Harris County and the Houston metropolitan area in offering and performing commercial banking services and activities. First City and Southern National are each substantial competitors in commercial banking in Harris County and in the Houston metropolitan area and there is substantial competition between them in commercial banking in each of these areas.

15. Customers of First City and Southern National have regularly utilized interstate communications, including the mails, telephone and telegraph to carry on their business with, apply for, and obtain the services provided by these banks. First City and Southern National have regularly utilized interstate communi-

cations, including the mails, telephone and telegraph, to conduct business with customers, and with other banks located in states other than Texas. First City and Southern National have received substantial amounts of funds from customers and correspondents located in states other than Texas and have made loans of substantial amounts to customers located in states other than Texas. First City and Southern National are each engaged in interstate commerce.

IV. OFFENSE CHARGED

16. Defendants First City and Southern National have entered into an agreement which was approved by the Boards of Directors of First City and Southern National, respectively, on or about May 12, 1966 and by the stockholders of each defendant bank on or about June 16, 1966, and which, if carried out, will result in a merger of Southern National with and into First City under the charter of First City and with the title of First City National Bank of Houston.

17. The effect of the merger of First City and Southern National, pursuant to the agreement described in paragraph 16 above, may be substantially to lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act.

18. The offense alleged in this complaint will be carried out and will continue unless the relief hereinafter prayed for is granted.

V. EFFECTS

19. The offense alleged in this complaint, if carried out and continued, will have the following effects, among others:

(a) competition between the defendants will be permanently eliminated;

(b) competition generally in commercial banking in Harris County and in the Houston metropolitan area will be substantially lessened and a tendency to monopoly created; and

(c) concentration in commercial banking in Harris County and in the Houston metropolitan area will be substantially increased.

PRAYER

Wherefore, plaintiff prays—

1. That the merger agreement described in paragraph 16 of this complaint be adjudged to be unlawful, in violation of Section 7 of the Clayton Act.

2. That defendants and all persons acting on their behalf be enjoined from carrying out the aforesaid agreement of merger or any similar plan or agreement, the effect of which would be to merge, consolidate, or in any other way combine the business of said defendants.

3. That the plaintiff have such other and further relief as the Court may deem just and proper.

4. That plaintiff recover the costs of this action.

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APPENDIX C

I

Supplemental Decision of the Office of the Comptroller of the Currency on the Application To Merge First City National Bank, Houston, Texas, and Southern National Bank, Houston, Texas, December 1, 1966.

This supplements our opinion of November 10, 1966 on the application for the merger of First City National Bank and Southern National Bank, both of Houston, Texas. On July 1, 1966, a recommendation to approve the merger was received from the Regional Administrator of National Banks for that (the 11th) District forwarding a report of investigation from the Chief Bank Examiner. The substance of the examination report was that the merger would have little, if any, competitive impact and that the merger would be very beneficial to the Houston metropolitan area. Reports were received on the competitive effect of the proposal from the Department of Justice (7/26/66)—substantially adverse; the Federal Reserve Board (7/25/66)—adverse; and the Federal Deposit Insurance Corporation (8/26/66)—not substantially adverse. After careful consideration of all representations, the appropriate officials in this Office recommended favorable consideration of the application to the Comptroller. On September 20, 1966, the then Comptroller, James J. Saxon, approved the merger for reasons, among others, set forth in the aforementioned November 10, 1966 opinion. On October 18, 1966, the Department of Justice brought suit alleging violation of Section 7 of the Clayton Act.

On October 26, 1966, this Office intervened in the suit and immediately moved against the pleading. This opinion is intended to supplement the findings of the former Comptroller and to affirm the position assumed under the Bank Merger Act of 1966[1] in his administration.

SECTION OF THE COUNTRY

The first antitrust criterion imposed by the statute is the establishment of an appropriate geographical market within which to measure the effects of the proposed merger. In *United States* v. *Philadelphia National Bank*[2] the Supreme Court established certain general rules:

> Therefore, since, as we recently said in a related context, the "area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, *and to which the purchaser can practicably turn for supplies*", * * * the four county area * * * would seem to be the relevant geographical market (p. 359).
>
> We recognize that the area in which appellees have their offices does not delineate with

[1] (5) The responsible agency shall not approve—

* * * * *

(B) Any * * * proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

[2] 374 U.S. 321 (1963).

perfect accuracy an appropriate "section of the country" in which to appraise the effect of the merger upon competition. Large borrowers and large depositors, the record shows, may find it practical to do a large part of their banking business outside their home community; very small borrowers and depositors may, as a practical matter, be confined to bank offices in their immediate neighborhood; and customers of intermediate size, it would appear, deal with banks within an area intermediate between these extremes * * *. So also, some banking services are evidently more local in nature than others. But that in banking the relevant geographical market is a function of each separate customer's economic scale means simply that a workable compromise must be found; some fair intermediate delineation which avoids the indefensible extremes of drawing the market either so expansively as to make the effect of the merger upon competition seem insignificant, because only the very largest bank customers are taken into account in defining the market, or so narrowly as to place appellees in different markets, because only the smallest customers are considered. We think that the four county Philadelphia metropolitan area, which state law apparently recognizes as a meaningful banking community in allowing Philadelphia banks to branch within it, and which would seem roughly to delineate the area in which bank customers that are neither very large nor very small find it practical to do their banking business, is a more appropriate section of the country in which to appraise the instant merger than any larger or smaller or different area * * *. We

are helped to this conclusion by the fact that the three federal banking agencies regard the area in which banks have their offices as an "area of effective competition."

[37] * * * As a practical matter the small business man can only satisfy his credit needs at local banks. To be sure, there is still some artificiality in deeming the four-county area the relevant section of the country so far as businessmen located near the perimeter are concerned. But such fuzziness would seem inherent in any attempt to delineate the relevant geographical market * * * and it is notable that outside the four-county area, appellees combined individual business rapidly thins out. Thus, the other six counties of the Delaware Valley account for only 2% of appellees' combined individual demand deposits; 4% of demand deposits of partnerships and corporations; 7% of loans; 2% of savings deposits; 4% of business time deposits (pp. 360–362).

These guidelines can only, of course, be generally accepted. Where statewide branching is permitted it would certainly be inappropriate to measure the impact of a merger only in the four corners of the state where each may, perchance, have some small branches. At the other extreme, in unit banking states, the market should not be restricted to the streets immediately adjacent to the merging institutions but must be extended to that area encompassing the geographic natural limitations of the intermediate customers of of whom the court speaks. We have interpreted the term "section of the country" as used in the opinion to mean a practicable socio-economic entity of a size not less than a metropolitan area[a] equivalency. We have taken the reference to "small businessmen", in the footnote, to equate with the expression "bank cus-

[a] Brown Shoe Co. v. United States, 370 U.S. 294 (1962). "Thus, although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area" (p. 337).

tomers that are neither very large nor very small" in the text. For it is the experience of bankers that the two thousand dollar inventory loan for the corner shoe store is as restricted to the neighborhood bank as is the two thousand dollar car loan or three hundred dollar checking account of the small individual customer.

Accordingly, the smallest "section of the country" which we will consider in testing the competitive effects of this transaction, is the Standard Metropolitan Statistical Area (SMSA) which was conceived in the U.S. Bureau of the Budget and is administered by the U.S. Bureau of the Census:

> The general concept adopted in defining a standard metropolitan area [is] that of an integrated economic area with a large volume of daily travel and communication between a central city of 50,000 inhabitants or more and the outlying parts of the area * * *. Each area * * * consists of one or more entire counties.[4]

The intermediate sized customer to which the Court addressed itself in *Philadelphia National Bank,* we have taken to include depositors and borrowers in the range of $10,000–$100,000 on the somewhat arbitrary assumption that customers of smaller size are restricted to neighborhod banks and customers of larger size fall within a national market range. The Department of Justice objects to this upper categorization, representing that the majority of such accounts are generally nevertheless from customers with local addresses. This objection, however, misconceives the nature of the distinction. As a matter of sheer inertial convenience, many accounts will be placed at the nearest large bank. This is not to say that they cannot readily and reasonably flow to banks in other met-

[4] II U.S. Bureau of the Census, U.S. Census of Business, 1954, p. 3. Quoted in Brown Shoe, supra, p. 298.

ropolitan areas should local services, interest payments, or costs get out of line with national figures. The relative ease with which such accounts may shift from market to market renders them largely immune to the effects of purely local trends towards concentration and therefore requires consideration in a greatly expanded market area. A purely local oligopoly has not the power to extract artificially high profits or to sustain inefficient or inferior services to a customer with the ability to shift banking connections at will. One hundred thousand dollars is a generally accepted figure at which banks seek business connections with enterprises located in distant parts of the country. We adopt it as a point at which a customer may be considered national in scope, recognizing that a considerably smaller figure is acceptable for certain very desirable types of business, while some volatile, "heavy traffic" business will not be sought out unless the volume is considerably higher.

In *Philadelphia National Bank, supra,* the Supreme Court departed from the SMSA concept somewhat by restricting its market to the four counties comprising and immediately contiguous to Philadelphia on the basis of what it understood to be special circumstances; i.e., the limitation of branching to the four counties, the state boundary between Philadelphia and three of the counties in the SMSA and, probably principally, because the fragmentary statistics available as to customer locus tended to show that Philadelphia bank penetration of these counties was minimal. The general impact of this type of evidence is, of course, to negative the conclusion of the Bureau of the Census that the SMSA established by it is "an integrated economic area." We will consider these factors when present, but we are inclined to give presumptive weight to the conclusions of the experts at the Bureau

of the Census as to the enormously complex resolution of the structure of economic units.

PRODUCT MARKET

There is no line of commerce standard set out in BMA-66 in contradistinction to earlier antitrust statutes. We believe that this omission is calculated and reflects a congressional intent that all financial institutions must be considered in evaluating the competitive impact of a proposed merger—that is, the product market is not restricted to commercial banks as was the case under Clayton Section 7 but encompasses all businesses which compete in one or more of the congeries of services offered by the banks under our supervision. Our reasoning to this end is articulated in our briefs in support of our motions to dismiss in this and other cases. It will not be repeated here. We note that dicta in the recent opinion of Judge Miller in *United States* v. *Third National Bank of Nashville et al.* (slip opinion already supplied the Court) is contra to our conclusion.

WHOSE EFFECT MAY BE SUBSTANTIALLY TO LESSEN COMPETITION

We again advert to the Supreme Court's opinion in *Philadelphia National Bank* as a logical starting point to our inquiry into the general competitive standards to be applied in bank merger inquiries.

> We noted in Brown Shoe Co., supra (370 U.S. at 315) that "[t]he dominant theme pervading congressional consideration of the 1950 amendments [to Section 7] was a fear of what was considered to be a rising tide of economic concentration in the American economy." This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market

structure, market behavior, or probable anticompetitive effects (pp. 362–363).

[O]urs is essentially a decentralized system of community banks. Recent years, however, have witnessed a definite trend towards concentration. Thus, during the decade ending in 1960 the number of commercial banks in the United States declined by 714, despite the chartering of 887 new banks and a very substantial increase in the Nation's credit needs during the period. Of the 1601 independent banks which thus disappeared, 1503, with combined total resources of well over $25,000,000,000, disappeared as the result of merger (pp. 325–326).

The present size of both Philadelphia National Bank and Girard is in part the result of mergers. Indeed, the trend towards concentration is noticeable in the Philadelphia area generally, in which the number of commercial banks has declined from 108 in 1947 to the present 42. Since 1950 Philadelphia National Bank has acquired nine formerly independent banks and Girard six, and these acquisitions have accounted for 59% and 85% of the respective banks' asset growth during the period, 63% and 91% of their deposit growth and 12% and 37% of their loan growth. During this period, the seven largest banks in the area increased their combined share of the area's total commercial bank resources from about 61% to about 90% (p. 331).

Of equally little value, we think, is the assurance offered by appellees' witnesses that customers dissatisfied with the services of the resulting bank may readily turn to the 40 other banks in the Philadelphia area. In every case short of outright monopoly, the disgruntled customer has alternatives; even in tightly oligopolistic markets, there may be small firms operating. A fundamental purpose of amending Section 7 was to arrest the trend towards con-

> centration, the *tendency* to monopoly, before the consumers' alternatives disappeared through merger, and that purpose would be ill-served if the law stayed its hand until 10, or 20, or 30 more Philadelphia banks were absorbed. This is not a fanciful eventuality, in view of the strong trend toward mergers evident in the area, see p. 331, supra; and we might note also that entry of new competitors into the banking field is far from easy (Court's emphasis) (p. 367).

One difficulty the court found in its legislative analysis was the fact that its prior decisions had limited the application of Clayton Section 7, in bank mergers, to stock acquisitions only and that the amendment in 1950 was, in terms, restricted only to "corporations subject to the FTC" (which excludes banks). The Court overcame this impediment by holding that

> The stock acquisition provision of Section 7 though reenacted in haec verba by the 1950 amendment, *must be deemed expanded in its new context* to include, at the very least, acquisition by merger or consolidation (emphasis supplied) (p. 346).

Similarly, we believe that the competitive criteria to be utilized in evaluating bank mergers under the standards of BMA–66 even though largely a reenactment in haec verba of previous antitrust standards must be deemed changed in this new context. Under Section 7 of BMA–66 the 2200[5] bank mergers which had taken place subsequent to the 1950 amendment to Clayton Section 7 were immunized from future prosecution on any antitrust ground other than monopolization. This stabilization of the status quo in banking as of February 1966 evidenced a congressional satisfaction or tolerance of the level of concen-

[5] From 1500 at the time of Philadelphia National Bank.

tration then extant in banking generally. Thus the finding of the Court that an unacceptable level of concentration was developing in banking and its conclusion that the 1950 amendment to the Clayton Act evidenced a congressional intent to reduce this tendency must be taken—in banking—to have been modified in its new (BMA-66) context.

Indeed, we conceive that this is no more than congressional recognition of a business reality. In *every* SMSA in excess of 300,000 persons, the same economic pattern repeats itself. There are one to five large banks in the community which possess a substantial majority of assets. These are accompanied by a scattering of a few to more than a hundred small banks serving localities within the community in a limited manner. A 1964 study in hand reveals that in the 62 SMSA's over 300,000 in population which permit branching (more than 50% of all commercial bank deposits)* the least concentrated shows 55.1% of assets in the hands of the five largest banks while the *average* concentration ratio for the five largest banks was 79%.

Thus we believe that the antitrust standards as to acceptable *levels* of concentration must be adjusted to norm for *this* industry. Further, we concur that tendencies toward monopoly are to be equally condemned once it is established what factors establish the existence of such trend.

* While comparable statistics are not completely available for the 23 (300,000+) remaining SMSA's which are located in states permitting only unit banking, an arithmetic average shows the average largest unit bank with 28.7% and the *three* largest averaging 59.4% of SMSA deposits.

CONVENIENCE AND NEEDS

We view these standards as reflecting no more than the traditional banking criteria for or against a proposed consolidation or branch or charter which this Office has been evaluating for more than one hundred years. We note, however, that this factor, which can overcome a substantially anticompetitive result, changes the geographic focus of inquiry. For while the antitrust standards are national in scope, in that while they are to be measured in an appropriate geographic area, no particular import is to be given competitive advantages flowing from a given course of conduct to one or another area; in "convenience and needs" our inquiry is directed to advantages and disadvantages flowing to a particular community. Thus, it is no answer to an objection here that the needs of a business may be served by an institution located elsewhere when such other service has a deleterious impact "on the community to be served." Specifically, that a business can go elsewhere to secure its financing may be a sufficient answer to a competitive justification for a merger; but that the community which has been deprived of that banking business has suffered in some discernable manner may be sufficient grounds to—nevertheless—sustain that same merger.

THIS MERGER, SECTION OF THE COUNTRY

As the appropriate section of the country within which to measure the effects of this merger on the class of customers which the Supreme Court conceives are primarily affected by mergers of this size, we have selected the Houston SMSA, the contiguous counties of Harris, Liberty, Brazoria, Chambers and

Fort Bend. In general support of the U.S. Bureau of the Census' designation of this area as an economic unit, we note that the most recent labor survey in the area demonstrated that more than one in five non-agricultural workers in the other four counties commuted to work in Harris County. The Manned Space Center south of Houston just completed in 1962, and the still embryonic Humble industrial and residential complex surrounding it, can but have the effect of enhancing this area focus on Houston and its environs.

Any objection that the 1965 change in SMSA from Harris to Harris plus four counties somehow negatives the inference of economic cohesion which arises from its structuring is, we think, misconceived. We think that the restructuring of the SMSA within the past year evidences a recent examination of the conditions present in the Houston metropolitan area by qualified economists at the Bureau of the Census. The very timeliness of the change helps to assure us that the geographic market selected is currently responsible. In the absence of evidence to the contrary, and in light of the supportive data cited above we believe the appropriate market to be that selected by the responsible government agency.

PRODUCT MARKET

As indicated earlier, we view the appropriate product market to include all financial institutions doing business in the SMSA. As of December 31, 1963 there were 115 commercial banks in the SMSA with 3.9 billion dollars in combined deposits. There were 20 savings and loan institutions with about 760 million dollars in deposits, some 240 credit unions with assets of more than 121 million in 1964, 3 large mortgage placement companies, many small loan and finance

companies and a large number of local and national insurance companies, to say nothing of the Federal government's direct lending agencies which had more than 630 million in outstanding loans in the Houston SMSA in 1965. According to a 1955 Federal Reserve Board study, New York banks alone had 375 million dollars in loans outstanding in the Houston area.

Although precise quantitative data cannot be secured as to the universe of this competition, we have adopted a conservative rule of thumb that the comprehensive figures available as to commercial banks should be, in this market, halved, in order to incorporate the impact of the "other financial institutions."

WHOSE EFFECT MAY BE SUBSTANTIALLY TO LESSEN COMPETITION

Two basic inquiries in evaluating the likelihood that a merger might "lessen competition" are (1) is the product and geographic market already over-concentrated, and (2) is the market structure *tending* towards monopoly or oligopoly.

A study of the actual banking market throughout the country reveals a structural pattern which differs markedly from that of nonfinancial businesses. It helps to explain why the specialty of banking has been recognized by the enactment of particular merger legislation.

The study discussed supra, which relates to more than one-half of all commercial bank assets in the United States, shows that the *five* largest banks in those 62 SMSA's average 79% of all area deposits and that the *average single* largest bank has 29.3% of area deposits.

There is no evidence that the Houston SMSA is over-concentrated, indeed, the statistics show a level of concentration well below national *averages*. Nor

do the facts reveal a tendency *towards* concentration. To the contrary, as the ensuing chart demonstrates, concentration of commercial bank assets (approximately the same relationships obtained for deposits and loans) has consistently dropped over the last ten years.

Number of banks	Percent concentration, 1956	Percent concentration, 1965
1	29.2	23.16
2	45.9	41.6
3	62.6	57.44
4	73.1	61.96
5	75.8	63.96
10	82.0	71.6

The absolute number of banks in the SMSA has almost doubled since 1955 from 66 to 115. Thus, it is clear that the market is not overly concentrated now, nor is it trending that way. The increase of slightly less than 2% in asset size of First City which would attend this merger compares favorably with its drop of more than 6% over the last ten years.

Lastly, we categorically reject the suggestion that "affiliates" should be considered competitively within the ambit of a central city bank's market shares. In the context of this case, an affiliate is to be understood to be a bank 50% or more owned by a group of stockholders who also own 50% or more of the stock of a larger bank. This peculiar, aberrational outgrowth of unit banking creates relationships between banks which are stronger than that of correspondents, but considerably weaker than branch status. Initially, there is of course no bank to bank link. The majority stockholders who also own a majority of the central city bank have a fiduciary duty to the minority stockholders to always act in their—not the central bank's

—best interest. The local board of directors has a responsibility to the depositors and the community which the bank serves which they cannot be presumed to shirk.

Based upon the foregoing, I find that the proposed merger would have the effect of lessening competition in the Houston SMSA. Indeed, the acquisition of any significant entrant by the largest financial institution in the community could hardly be expected to have any other effect.

I do not believe, however, that this effect can be conceived as either actually or probably *substantially* anticompetitive. The level of concentration obtaining in the Houston SMSA is comfortably below national *averages* and will remain so after this merger. The long term trend in the community demonstrates a strong and continuing pattern of deconcentration of banking assets. Finally, the entry of some 49 new banks in the last 10 years has conclusively established an ease of entry which should still any fears that loss of one 2 percent entrant could seriously affect the options of the \$10–\$100,000 customer whose needs could be served by a major portion of the 115 banks still extant in the market after the merger.

We therefore need not reach the further question of the "convenience and needs of the community to be served."

But even if we had viewed the competitive factors as substantially adverse, we would, nevertheless, have approved the merger. For we conceive that the manifold advantages accruing to the Houston area as a result of this merger are so pervasive and substantial as to outweigh the competitive impediments now postulated.

CONVENIENCE AND NEEDS OF THE COMMUNITY TO BE SERVED

The growth of Houston over the last 45 years has been explosive. Between 1920 and 1960 it grew some 678% *or 4 times* the national percentage of 169.6%. This dynamic growth pattern has a sound economic base substantially and chronologically in cotton, cattle, timber, shipping, manufacturing, oil and petrochemicals. The city has leaped from census to census from 45th, to 27th, to 21st, to 14th, to 7th and now to 6th largest city in the country. It is now our third largest port, the largest city in the south and southwest, and the single most important center of the oil and petrochemical industries. Somewhat characteristically of an explosive growth situation, there has developed in Houston something of a capital pinch not unlike that obtaining in a business undergoing similar growth. Thus, while the population of the Houston SMSA grew some 83.1% between 1950–1964 or some 314% greater than United States total population growth of 26.4%, the deposit growth of SMSA commercial banks was only 131.64% or 63.4% higher than total United States growth of 83.48%. This surging growth pattern will maintain Houston as a net capital importer through the foreseeable future. Thus, we have a community with capital needs and sophistication of banking services required which considerably outstrip the lagging financial structure in the community. As the third largest port in the country, Houston should have at least two banks with substantial international departments—it now has none. It is the opinion of the National Bank Examiner who oversees the activities of First City that its Trust and Investment Departments are also inadequate to the sophisticated needs of the large business interests in the community. While it is true that

banks elsewhere stand ready and willing to provide such services, the expatriation of the funds and in some instances the business which the use of these banks might entail is not in the best interest of Houston—which the statute establishes as the ultimate end to be served. We do not subscribe to the proposition advanced by the applicants that this relatively minor acquisition (in terms of assets acquired) will, of itself, make all or any of these objectives immediately obtainable. We do conclude, however, that the attendant increase in size is a distinct factor tending measurably towards the accomplishment of these highly desirable and necessary goals.

In sum, then, in markets where the needs of the community have outstripped the capabilities of local banks to expand their services out of normal growth of those institutions, we will look favorably upon such artificial stimuli as may be necessary to create a structure capable of supplying the required services.

The applicants suggest that the merger will cure a substantial management succession problem which exists at First City to the ultimate advantage of the banking community in Houston. The report of our Chief Bank Examiner for the Region tends to confirm the contention. He reports that Kline McGee, president of Southern and to be president of the merged institution, is one of the finest bankers in the southwest who "heads a well-balanced, capable and progressive staff of young bankers." He notes further that First City:

> as a result of previous conservatism has not met its responsibilities in expanding management in keeping with the growth of the banks and Houston proper. It could be argued that it could go into the open market and bid for capable bankers and it could undoubtedly do so; however, this merger presents an oppor-

tunity to obtain a ready-made staff of highly skilled bankers who have proved themselves in local business circles. The degree of conservatism and domination that has been exercised in the hiring of young officers and even clerks and secretaries in the charter bank is amazing. This conservatism has resulted in a dire management need on the part of the First City National Bank. It is a strong point in the application and it is indeed a favorable factor to the request.

We subscribe to the general sentiments expressed by the Examiner. Further, we note that the merger of these institutions allows the insertion of these young (average age 43) officers into the older (average age 53) officer structure of the large bank in a relatively inoffensive manner. It is common human experience that executives "brought in from outside" encounter considerably more difficulty in changing an overly-conservative business organization than obtains when the innovator comes from inside the structure. The importance of the Southern management to First City—disproportionate to the relative size of the merging unit—is underscored when we note that the *difference* between the loan/deposit ratios of First City and Southern (50% and 68.8%) would increase First City's loans (and, arguably, community service) by more than 3½ times Southern's total loan portfolio.[7]

[7] At the time of the application, First City had deposits of $850,843,000. An increase of 18.8% in loans would amount to about $160 million or about 3.6 times Southern's loan portfolio of $44 million.

CONCLUSION

The proposed merger is not substantially anticompetitive. But even assuming it were, Houston has a demonstrated need for a more substantial banking institution capable of providing the sophisticated banking services which the extraordinary growth of the community requires. This merger will supply the largest bank in Houston with more effective management and a larger asset base from which it can program more of the community services it should be performing.

WILLIAM B. CAMP,
Acting Comptroller of the Currency.

II

OPINION OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATION TO MERGE SOUTHERN NATIONAL BANK OF HOUSTON, HOUSTON, TEXAS, INTO FIRST CITY NATIONAL BANK, HOUSTON, TEXAS, UNDER THE CHARTER AND WITH THE TITLE OF THE LATTER

STATEMENT

On June 15, 1966, Southern National Bank of Houston, Houston, Texas, with IPC deposits of $48.8 million, and First City National Bank, Houston, Texas, with IPC deposits of $626.8 million, applied to the Office of the Comptroller of the Currency for permission to merge under the charter and with the title of the latter. This opinion sets forth the bases of the decision of this Office, dated September 20, 1966.

Houston, with a metropolitan area population of approximately 1.765 million, is the center of the most

populous metropolitan area in the southwestern United States. Its Standard Metropolitan Statistical Area is defined by the Census Bureau as Harris, Brazoria, Fort Bend, Liberty and Montgomery Counties, although the city serves the entire Gulf Coast. An extraordinary combination of growth factors created a population increase of 65.9% between 1950 and 1960. Between 1960 and 1965, the Houston area population increased by 17%. The prospects are for continued growth with a projected 1970 population exceeding two million.

The genesis of Houston's amazing growth has been its economic diversity, supported by an advantageous geographical location and abundance of natural resources. Founded in 1836, Houston has, at various periods in its history, been economically supported by cotton, cattle and timber, trade and shipping, marketing and manufacturing, and petroleum and chemical refining. Each new activity has taken its place in the Houston economy without replacing its predecessor. Texas Employment Commission figures for the first quarter of 1965 show that 9.7% of Houston area workers were employed in durable goods manufacturing, 8.2% in nondurable goods manufacturing, 7.1% in transportation, 8.3% in construction, 8% in wholesale trade, 18.6% in retail trade, 5.7% in finance and insurance, 7.3% in business and personal services, 6.9% in medical and professional services, 9.3% in government, and 10.9% in other categories. The following table published in the 1963 U.S. Department of Commerce Census of Business illustrates the diversity of the Houston economy.

Manufacturing establishments, employees, and value added by major industry groups, Houston SMSA

Industry groups	Establishments, December 31, 1963	All employees, December 31, 1963	Percent of total employees	Value added, manufactures, 1963 ($000)	By percent, total value added
Manufacturing	2,197	106,059	100.0	1,889,693	100.0
Food and kindred products	187	11,221	10.6	218,786	11.6
Textile mill products	10	585	.5	3,295	.2
Apparel and related products	86	1,348	1.3	8,776	.5
Lumber and wood products	149	2,328	2.2	14,090	.7
Furniture and fixtures	80	1,653	1.6	13,263	.7
Paper and allied products	37	3,162	3.0	42,281	2.2
Printing and publishing	282	5,764	5.4	53,870	2.8
Chemical and allied products	180	16,174	15.2	601,657	31.8
Petroleum and allied products	31	10,505	9.9	321,942	17.0
Rubber and plastics products	45	1,421	1.3	14,297	.8
Stone, clay, and glass products	130	4,852	4.6	61,751	3.3
Primary metal industry	65	9,670	9.1	131,969	7.0
Fabricated metal products	306	13,611	12.8	134,498	7.1
Machinery, except electrical	400	14,890	14.0	205,542	10.9
Electrical machinery	79	2,079	2.0	27,311	1.4
Transportation equipment	68	2,141	2.0	17,509	.9
Instruments and related products	48	1,064	1.0	10,986	.6
Miscellaneous manufacturing	69	587	.6	5,337	.3
Administrative and auxiliary		2,961	2.8		
				Payroll ($000)	Sales ($000)
Wholesale trade	2,553	N.A.		171,295	2,694,069
Retail trade	13,082			190,443	1,781,921
Selected services	8,505			80,842	278,309

In addition to its variety, the Houston economy is marked by great quantitative strength. This power is particularly well illustrated in manufacturing, where Houston industries account for the following amounts of the nation's total value added: petroleum and coal products, 9%; petroleum refining, 10.6%; chemicals as a whole, 3.4%; basic chemicals, 6.9%; construction and like equipment, 5.7%; and fabricated metal products, 2.5%. The Houston area petroleum refining complex is the world's largest and its chemical industry is the nation's fastest growing.

The outlook for these industries continues to be promising because of an abuandance of hydrocarbons, salt, sulphur and lime, plus excellent transportation facilities.

Perhaps as much as any single factor, Houston's transportation facilities have played a vital role in the Houston boom. The 50-mile ship channel linking the city to the Gulf of Mexico has particularly benefited the Houston area. Since 1910, the Federal Government has spent $53 million to dredge and maintain the channel, yet customs revenue exceeds the total federal investment every two years. The Port of Houston is the third largest of U.S. seaports in total tonnage moved. Served by 117 steamship lines which bring more than 4,000 ships to the port annually, Houston's total cargo moved in 1965 was approximately 58 million short tons.

In addition to the ocean-going freight, access to the intracoastal channel provides Houston with low-cost barge transportation. This 1,777 mile waterway links the city with some 9,812 miles of waterway in the Mississippi River region, and 2,100 miles of waterway into the Gulf South. In 1963 inland waterway tonnage in the Houston area exceeded 22 million net tons.

In air transportation, Houston is well served by 10 airlines which had total passenger arrivals and departures of 2.6 million in 1965. The present Houston International Airport is already strained by heavy traffic, and a second airport, Houston Intercontinental Airport, is now under construction on a 7,000 acre tract in north Harris County. With facilities to handle both subsonic and supersonic air transportation, the new airport is designed to accommodate the anticipated growth of area traffic.

Houston also offers good surface transportation. Six major rail systems serve the city and total freight

handled by rail in 1965 was 18.9 million short tons, a 24% increase over 1960. Motor freight is provided by 34 common carrier truck lines as well as by a number of specialized carriers, including 41 oil equipment haulers, 14 tank truck lines, 17 household carriers, and 20 miscellaneous specialized carriers. Five bus systems provided hourly service in all directions. A $500 million freeway system will extend 245.5 miles in the form of inner and outer loops around the city with connections from Houston's downtown center to provide quick, efficient access to the entire metropolitan area.

The transmission of oil and gas is also a major factor in the Houston economy. The city is the hub of a pipeline network which includes 40 crude oil pipelines and 29 products pipelines. Ten natural gas pipeline companies headquartered in the city and four other companies having national operations in Houston account for a quarter of the national gas pipeline firms.

The rapidly expanding Houston business climate served by these transportation and transmission facilities has required an enormous amount of construction. In 1965, the value of building permits ranked Houston third in the nation. Nonresidential construction contract awards in that year totaled $377.4 million. From 1960 to 1965, the total of such awards was $1.8 billion. The estimated value of residential units completed in 1965 was $222.6 million, and from 1960 to 1965, was $1.1 billion. While suburban areas have spawned substantial business areas of their own, the downtown section of Houston has added about 10 million square feet of new building space since 1950 and the workday population has increased by more than 80 thousand persons to an estimated 180 thousand in 1965.

New business developments in Houston indicate that the momentum of the economy's growth will not diminish. Humble Oil and Refinery Company has commenced an industrial, commercial and residential complex on 30 thousand acres within the metropolitan area which is expected to require $1.4 billion in total capital investment, $1 billion annually in sales, 25 thousand new jobs and $166 million annually in new payroll by 1984. This development surrounds the NASA Manned Space Craft Center, which now has 5,000 employees with an annual estimated payroll of $60 million. NASA has granted procurement contracts totalling $25.4 million in 1965 to Houston area concerns.

Another major entry into the Houston area is a new United States Steel Company manufacturing facility. This project will require an initial $150 million investment for plant and related facilities covering 15 thousand acres.

The full importance of the Houston economy is manifestly evident when comparison is made with the two other large metropolitan areas, Dallas and New Orleans, in Houston's section of the country. The following table indicates that Houston surpasses both the other cities in most of the important economic indicators.

	Houston	Dallas	New Orleans
Composite Indexes of Economic Importance	1	2	3
Composite Indexes of Amount of Growth	1	2	3
Total City Population Corporate Limits, 1964	1,091,800	802,600	663,500
Population Ranking among U.S. Cities, 1964	6	9	15
Absolute Increase in City Population, 1964/1950	495,637	368,128	93,065
Total Metropolitan Area Population, 1964	1,652,800	1,310,600	997,400
Absolute Increase in Metropolitan Area Population, 1964/1950	708,200	560,000	277,500
Percent Population Increase in Metropolitan Area Population, 1964/1950	76.7	76.3	45.5
Total Value Added by Manufacture, 1963	$1,889,693,000	$1,164,721,000	$627,018,000[4]
Total Bank Demand Deposits, 1964	$1,618,633,200	$1,369,165,700	$659,730,900
Total Building Permit Values, 1964	$321,700,000	$193,506,000	$105,300,000

In addition to capital investment and production facilities, Houston is an educational, cultural and recreation center. There are more than 36,000 students in twenty Houston area colleges and universities including the noted Rice University, the large University of Houston and the famed Baylor University College of Medicine. A new center for the performing arts, Jones Hall, provides one of the finest such facilities in the country. The Houston Symphony is one of the leading American orchestras, and four legitimate theaters give performances throughout the year. The Museum of Fine Arts has an extensive and varied collection. Spectator sports are well represented by the Oilers of the American Football League, the Astros of the National Baseball League and intercollegiate games. Sports facilities include numerous parks and playgrounds, golf courses, swimming pools, and tennis courts, as well as lakes and the Gulf of Mexico. These facets of Houston create a pleasant environment which should insure Houston's place as a major population center of the southwestern United States.

This description of the Houston economy indicates an area of unusual vigor with heavy and sophisticated demands on its facilities and resources. These needs are remarkably well met in almost every phase of the Houston economy, with the exception of financial institutions.

The entire state of Texas, and Houston in particular, is handicapped in providing indigenous financing to local industries and businesses by the archaic state branch banking laws which forbid any establishment or operation of branch banks in Texas. This artificial restraint has prevented the downtown banks from following their customers to the suburbs and from generating new business among the many com-

mercial and industrial establishments operating in the suburban shopping centers and industrial complexes. The result of this impediment has been to limit unduly the accumulation of capital resources by the urban commercial banks, thus preventing some businesses from obtaining funds for investment in new facilities or driving them to financial centers outside the area which are able to meet their needs.

The fact that there are 115 banks in the Houston SMSA demonstrates the dispersion of banking resources. Many of these banks, most of which have resources under $10 million, are located in suburban areas where branching would be a logical method of expansion.

The largest Houston banks have had particular difficulty in meeting their responsibilities. While the area ranks thirteenth in population in the nation, the charter bank, the largest bank in the area, ranks forty-first nationally. The Texas National Bank of Commerce, which is the second largest Houston bank, stands fifty-second nationally. The failure of the Houston banks to keep pace with the growth of its area has led to unfortunate results. Cities with more satisfactory banking facilities can attract industry which needs large-scale financing. Moreover, many local projects are simply unable to obtain financing due to the preference of large banks in other areas for projects in those areas.

In the past year, the charter bank was forced to decline or divert over $31 million in loans requested by sound and prosperous local companies because its loan limit was not sufficient. Because of its inadequate size relative to the community it serves, First City was also forced to participate over $77 million more in loans.

The merging bank also found itself unable to cope with the demands of its customers. Southern Na-

tional was forced to participate almost $16 million of loans last year because of its inadequate size. Its lending limit, in an area of such unparalleled growth as Houston, is $600,000.

With the rational means of expanding—i.e. branching—foreclosed to the applicant banks, growth adequate to meet the increasingly heavy demands of the Houston community is available only through merger. The transaction must, however, meet the criteria of the Bank Merger Act, as amended.

The effect of the merger upon competition must be considered in judging the application. The Houston area is marked by intense competition among a plethora of financial institutions. There are 115 commercial banks, with total resources of $4.386 billion in the Houston metropolitan area, 23 savings and loan associations in Harris County with total savings accounts of $758.2 million, 240 credit unions with assets of $120.9 million, 232 finance company offices, 13 factors and 12 small business development companies. Harris County alone, which contains the downtown Houston area, has 85 individual unit banks. In addition, 50 insurance companies domiciled in the Houston metropolitan area and many others operating there make loans estimated at hundreds of millions of dollars. The largest mortgage banking firm in this country, which services 1.4 billion dollars of loans, and four other large mortgage companies which service an additional 1.4 billion dollars of loans are headquartered in the Houston metropolitan area. All of these institutions vie for the loan and savings dollars of the potential Houston area customers of the applicant banks. A further indication of the strong competition is that in 1965 the largest single financer of new cars purchased in Harris County was GMAC, which financed 11.5% of the cars financed. The

charter bank financed but 2.7% of the new cars financed, and Southern National financed only 0.5%.

The intense competition is particularly well illustrated by the fact that, in an eight-block area in downtown Houston where both applicant banks are located, there are eight banks either larger than, or of comparable size to, Southern National. In the same area, there are five other, similar downtown banks which provide adequate retail banking services. All 13 competing banks are easily and quickly reached by walking or using the shoppers special bus which traverses the downtown area at five minute intervals. In addition, there are eight savings and loan home offices, and one savings and loan branch within this eight-block area. These offices, together with the numerous suburban offices of financial institutions, indicate that a very wide range of choices will remain after this merger. Indeed, in the period from 1956 to 1965, the percentage of total assets, deposits and loans in the Houston area held by the largest Houston banks declined substantially as pointed out in the following table:

Concentration in commercial banking

	Column 1—1958			Column 2—1965			Column 3—Percent decrease in concentration			Column 4—Percent increase in concentration after merger			Column 5—Percent decrease in concentration remaining		
	Assets	Deposits	Loans	Assets	Deposits	Loans	Assets	Deposits	Loans	Assets	Deposits	Loans	Assets	Deposits	Loans
Top 3 Banks	62.6%	61.6%	63.1%	57.4%	56.6%	56.0%	8%	8%	13%	3.3%	3.5%	3.9%	4.7%	4.5%	9.2%
Top 5 Banks	75.8%	75.2%	76.4%	63.9%	63.1%	62.4%	16%	16%	18%	3.6%	2.1%	3.3%	12.0%	11.9%	14.7%
Top 10 Banks	82.0%	81.5%	82.8%	71.6%	70.9%	72.1%	12%	12%	12%	2.6%	1.7%	1.7%	9.4%	10.3%	10.3%

It has been alleged in advisory reports from other agencies that the applicant banks have affiliates whose deposits and loans should be added to those of the applicant banks for the purpose of determining concentration. While it is true that certain interests owning shares in the applicant banks also own shares of some smaller banks in the Houston area, each of these banks operates independently. They have, for example, turned down participation loans offered by the applicant banks. In no case does any officer or director of one of the applicant banks own as much as 50% of a smaller bank. Some of these smaller banks do have close relationships with the applicant banks, but these correspondent type relations are common among independent banks. Because these so-called affiliate banks operate independently with an independent board of directors, we cannot include them in determining the percentage of concentration of the applicant banks in the Houston area market.

Competition for accounts is not confined to the Houston area. Both of the applicant banks are primarily wholesale banks and thus compete in the national market. It is widely held in the banking profession that accounts of $100,000 or over are considered to be wholesale accounts because their size permits them to take advantage of the best banking conditions in any part of the country. Statements from other quarters that such accounts do not actively shop among major banks, regardless of geography, only indicate a lack of familiarity with the operations of financial institutions, particularly commercial banking. The charter bank has 76% of its IPC demand deposits in large accounts of $100,000 and over, and the merging bank has 71% of its IPC demand deposits in the over $100,000 accounts. Loans in excess of $100,000 represents 79% of First City's total commercial and industrial loans, and 78% of South-

ern's total commercial and industrial loans. First City has 42% of its lines of credit, or $63,000,000, extending to firms operating beyond the Houston metropolitan area. In the $100,000 and over IPC demand deposit accounts, individuals and firms with headquarters outside the Houston SMSA accounted for 41.2% of First City's accounts and 34.5% of Southern National's accounts.

In correspondent accounts, the charter bank has 535 deposit accounts totaling $113.937 million. Four hundred twenty of these accounts are from American banks outside the Houston SMSA, and 47 are from foreign banks. Southern National has deposit accounts from 41 banks outside the Houston SMSA totaling $4.533 million, and from 25 banks within the SMSA totaling $8.452 million.

Although it is difficult to document because of private bank records, competition by major banks located in other financial centers is vigorous in Houston. Banks in New York, Boston, Chicago and Dallas and on the West Coast enter the Houston area and obtain sizable loans. A 1957 Federal Reserve study, for example, reported that New York banks held $375 million of loans to Houston borrowers, the largest amount of out-of-city loans made by New York banks that year. This intense competition from out-of-state banks has not abated over the years, but has, in fact, increased in vigor.

It is clear then that the effect of the merger upon competition will not be adverse in the Houston area as there will remain a wealth of choices for financial services in the downtown and suburban areas. In the wholesale banking market, which is the specialty of both applicant banks, the merger will be a salutary influence on competition because of the increased

ability of the resulting bank to compete effectively with other large wholesale banks.

Another factor which must be considered under the Bank Merger Act is the management of the applicant banks. The charter bank, while well managed in the past, now finds itself seriously understaffed, largely due to recent deaths and retirement of its officers. There are no immediate prospects for relief, apart from the merger, because many of the charter bank's key officers are near the retirement age. Recruitment from outside is both difficult, because of the national shortage of qualified bank personnel, and uncertain, because of internal morale problems when new employees are systematically brought in above First City's present personnel.

The infusion of personnel from the merging bank will alleviate this problem. With respect to age, the average age of Southern National's executives is ten years below the average age of First City's, and Southern National's executives are grouped in age brackets and job categories where First City has the greatest needs. After merger, the resulting bank will be able to staff adequately its existing departments and expand into broader areas of service which are required in the Houston area.

The increment in services will permit a greater response to the convenience and needs of the Houston community. There are a number of areas in which the applicant banks do not offer adequate service, or any service, but where the combined resources and manpower of the resulting bank would permit the offering of these services.

Neither of the banks offers long-term permanent real estate loans. The combined construction loan staffs of the applicant banks will enable the resulting bank to expand into a permanent real estate loan operation.

These loans could be handled for the bank's own portfolio, for investments by trusts which the bank is servicing, and as a means to enlarge mortgage servicing to other institutions.

The resulting bank will also be able to offer more comprehensive automated services to the Houston community than either applicant bank now offers. While both banks have been primarily occupied with internal operational needs in the automation area and the provision of such services to other banks, the combining of the banks will permit expansion into professional billing, insurance premium processing, brokerage accounting and other areas. Commercial accounting services which will be expanded or originally offered by the resulting bank include payroll, receivables, payables and general ledger accounting services.

Another major advantage of the merger will be the development of a substantial international department. Although the four largest banks in Houston now offer some foreign banking services, they are not adequate for the international commerce generated in the Houston area. With the increased manpower and facilities of the resulting bank, establishment of foreign agency offices and organization of an Edge Act subsidiary for expanding foreign activities become feasible for the resulting bank. With the increasing importance of Houston as a foreign trade center and the continuous overseas expansion of the oil and gas industry, much of it based in Houston, the development of a strong international department by the resulting bank will be a notable service to the community.

A new department will be created to handle equipment leasing financing. The charter bank has not had personnel to handle this business to any appreciable extent and the merging bank has been impeded by a

lack of loanable funds. This new department will offer increased competition to the Houston area banks now offering this service.

The trust department of the resulting bank will be strengthened by the merger. Corporate trust services concerned with debenture issues and various types of secured corporate indentures will be offered to the customers of the merging bank. The charter bank's collective investment programs, and services to local mutual funds and development funds would be expanded. The establishment of a real estate investment trust would be within the capability of the resulting bank's trust department.

The applicant banks also expect to increase the activities of the investment department now operated by the charter bank. There should be greater participation in the municipal bond dealer area, as well as in the purchase and sale of government bonds and federal agency obligations. In addition, the resulting bank could provide expanded money desk, federal funds and negotiable certificates of deposits services.

Thus, it is evident that the convenience and needs of the Houston area banking community will be considerably enhanced by the proposed merger. The increased size and complexities of the Houston economy demand these new and improved banking services. We, therefore, find that any anti-competitive effects of this transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the Houston area community, and the application is approved.

JAMES J. SAXON,
Comptroller of the Currency.

Dated NOVEMBER 10, 1966.

III

Report by the Board of Governors of the Federal Reserve System to the Comptroller of the Currency, Under Section 18(c) of the Federal Deposit Insurance Act, on the Competitive Factors Involved in the Proposed Merger of Southern National Bank of Houston, Houston, Texas, into the First City National Bank of Houston, Houston, Texas

I. The Proposal

First City National Bank of Houston, Houston, Texas (City National) (deposits $850,843,000 as of April 5, 1966), and Southern National Bank of Houston, Houston, Texas (Southern National) (deposits $66,309,000 as of April 5, 1966), have requested prior written consent of the Comptroller of the Currency to merge under the charter and title of City National.

The two banks are situated across the street from each other in downtown Houston, and are connected by an underground tunnel. The Southern National Bank building was formerly the First City National Bank building. Under Texas law, a bank may not operate branch offices. However, in this instance Applicants have advised that officials of the Banking Department of Texas have been contacted and indicated that the use of both bank buildings, including detached drive-in facilities of Southern National, would not be viewed as operating a branch. Accordingly, the resulting bank plans to utilize the banking quarters of both banks as they now exist.

II. The Community

Houston (1960 population 938,000) is in Harris County (1960 population 1,243,000), and the Houston Standard Metropolitan Statistical Area as defined by the U.S. Bureau of the Budget consists of five area counties (1960 population 1,418,000). Houston is the

first-ranking city in the southwest from the standpoint of industry and population and the sixth largest city in the nation. The Houston area has been one of the most rapidly growing areas in the United States and is one of the world's leaders in the production of oil, gas, refined products, chemicals, petro-chemicals, oil tools and in related manufacturing, and processing and servicing activities. Houston is ranked as one of the nation's three greatest deep seaports, and these facilities are constantly being expanded and improved. Of considerable importance to the local economy was the establishment of NASA's Manned Space Center, 15 miles southwest of downtown Houston, in 1962. Prospects for continued growth and development in the area are favorable.

III. Competition Between the Two Institutions

As previously indicated, the two banks are located across the street from each other in downtown Houston.

The following schedule shows the major segments of the loan and deposit accounts of the two banks as of April 5, 1966:

	Percent of total	
	City National	Southern National
LOANS		
Commercial and industrial	60	52
Consumer	17	19
Real Estate	3	14
Loans to financial institutions	17	----------
Loans for purchasing or carrying securities	----------	15
Other	3	----------
	100	100
DEPOSITS		
IPC—demand	48	43
IPC—time	26	31
Public Funds—demand and time	9	5
Banks—demand and time	16	20
Other—demand	1	1
	100	100

An analysis of the loan and deposit accounts of the two banks discloses similarities in the type of business conducted, indicating that the banks are similar in general character except for size. Loans represent approximately 50 per cent of deposits at City National and 69 percent of deposits at Southern National. The current legal lending limit is approximately $7,500,000 and $600,000 at City National and Southern National, respectively. There is no significant difference in the interest rates charged on loans, service charges on demand deposits, or interest paid on time and savings deposits.

Both banks offer fiduciary services. No common ownership or management was disclosed.

Consumation of the proposed merger would eliminate existing and potential competition between the two banks.

IV. Other Competitive Effects

There were 115 banks operating in the (five county) Houston Standard Metropolitan Statistical Area as of December 31, 1965, of which 85 were in Harris County and 60 of these were in the city of Houston. There were 16 banks in downtown Houston within a 27-block area. City National is the largest bank in the Houston area and Southern National is the sixth largest bank. As of December 31, 1965, the 3 largest banks in Harris County held approximately 60 percent of the county's deposits. The following schedule shows the relative position of the banks in Harris County as of December 31, 1965. According to Applicants, each of the banks involved in this proposal derive 75 per cent of their deposits of individuals, partnerships and corporations from Houston and Harris County.

	Total deposits, Dec. 31, 1965	
	Amount (thousands)	Percent
City National	$911,702	24.6
Southern National	77,562	2.1
Resulting bank	989,264	26.7
Texas National Bank of Commerce	709,080	19.1
Bank of the Southwest NA	587,401	15.8
Houston National Bank	169,417	4.6
Houston Bank & Trust Co.	82,303	2.2
Bank of Texas	60,520	1.6
Continental Bank & Trust Co.	64,565	1.7
Fannin Bank	51,768	1.4
Citizens State Bank	51,354	1.4
Pasadena State Bank	47,173	1.3
State Main Street Bank	44,775	1.2
73 other banks with deposits less than $40,000,000 each	849,420	22.9
Total	3,707,040	100.0

City National is affiliated by common ownership with 10 other banks located in Harris County, which have aggregate deposits of about $188 million. City National and its 10 affiliates control about 30 percent of deposits held by Harris County banks. Southern National is affiliated through common ownership with 2 other Harris County banks, which have total deposits of about $26 million, and thus, Southern National and its affiliates control about 3 percent of Harris County bank deposits. The resulting institution, considering its affiliates, would hold 33 percent of Harris County bank deposits.

City National has been involved in several mergers since it was chartered in 1934, and became the largest bank in Houston upon its merger with First National Bank in 1956. Southern National was chartered in 1960 and remained a relatively small bank until the Texas Eastern Transmission Corporation acquired 46.8 percent of the bank's outstanding stock in early 1962; the bank has progressed rapidly since that time.

During the investigation of this proposal, officials of all the larger downtown banks were contacted, and

all expressed the opinion that their competitive positions would not be adversely affected by the proposal. None offered any objection to the proposed merger, and no apprehension was expressed that competitive rates and practices would become detrimental.

Nonbank financial institutions in Houston include numerous savings and loan associations, credit unions, sales finance companies, mortgage companies, factoring agents, and insurance companies. Competition from financial institutions located in other major financial centers is also substantial.

V. Conclusion with Respect to Competitive Factors

Consummation of the proposed merger of First City National Bank of Houston and Southern National Bank of Houston would eliminate existing and potential competition between them and enhance City National's position as the largest bank in the Houston area. The overall competitive effect of the proposal would be adverse.

> NOTE.—As required by section 18(c) of the Federal Deposit Insurance Act, this report is limited to a report on the competitive factors involved, and is not a recommendation as to whether the application should be approved or disapproved.

IV

DEPARTMENT OF JUSTICE,
Washington, July 26, 1966.

Hon. JAMES J. SAXON,
Comptroller of the Currency,
Treasury Department,
Washington, D.C.

DEAR MR. SAXON: This is in response to a letter which we received from your office on June 23, 1966,

requesting a report pursuant to the provisions of Section 18(c) of the Federal Deposit Insurance Act on the competitive factors involved in a proposed merger of First City National Bank of Houston, Houston, Texas (First City), and Southern National Bank of Houston, Houston, Texas (Southern National).

Your office transmitted to us with your letter of request only a limited portion of the merger application filed with you by the banks. Your office removed from the application the data and information pertaining to the effect of the proposed transaction on competition, the convenience and needs of the community, management of the banks, and the banks' financial history and condition.

The banks' complete merger application was furnished to the Antitrust Division by counsel for First City under cover of a letter dated July 8, 1966 in which counsel for First City advised us that they had been informed that your office had no objection to their furnishing the Division with copies of the application as submitted to your office. This application is the principal source of information relied on in this report.

The Merging Banks.

First City is the largest commercial bank in Houston and the third largest bank in the State of Texas. Although its predecessors go back many years, it was chartered in 1934 as City National Bank of Houston and its present name was assumed in 1956 when City National merged with First National Bank in Houston. It conducts a complete commercial banking and trust business through its office at 1001 Main Street in downtown Houston. As of April 5, 1966, First City had total assets of $966,535,000, total deposits of $850,843,000, and total loans of $426,119,000. In 1965 its net current operating income was $12,038,000, or

about 14 per cent of its total capital accounts. Its average net operating income for the period 1961–1965 was $10,685,000.

Southern National is the sixth largest commercial bank in Houston. It was chartered in 1960, has never participated in any merger or consolidation, and its rate of growth has been greater than that of any other bank opened in Houston in the last ten years. In 1960 its deposits amounted to $6,390,000. As of April 5, 1966, it had total deposits of $66,309,000, total assets of $81,761,000, and total loans of $45,638,000. In 1965 its net current operating income was $948,000, or about 13 per cent of total capital accounts, and in the period 1961–1965, its average net operating income was $595,000. It conducts a commercial banking and trust business through its office at 921 Main Street in downtown Houston, directly across the street from the office of First City. The proximity of the offices of the merging banks will make the proposed merger unique among mergers in Texas. State laws do not permit branch banking and, in the usual case, the facilities and location of the acquired bank are lost. However, because the offices of First City and Southern National are in buildings which are less than 500 feet apart and connected by a tunnel, Texas law permits the continued use of both banking houses.

Relevant Markets

According to the application, the "community to be served" by the merged bank is the Houston metropolitan area, which ranks thirteenth in size among all metropolitan areas in the United States and has a population of 1.7 million. As presently constituted, the Houston SMSA includes Harris County, in which Houston is located, and the four adjoining counties of Brazoria, Ford Bend, Liberty, and Montgomery.

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Prior to March 1965, however, the Houston SMSA was largely confined to the limits of Harris County. This change in the coverage of the Houston SMSA necessitates qualifications in making comparisons between the banking structure of the area as presently defined and that of earlier years, and may lead to unwarranted assumptions regarding the extent of competition between the area's largest banks—all of which are located in Houston—and many of the smaller banks in Harris County and the four outlying counties.

For example, by reason of the 1965 change in the coverage of the Houston SMSA, at least twenty-seven small banks in the outlying counties are now included in the Houston metropolitan area and are listed in the application as competitors of the merging banks. But there are no data in the application to support the assertion that these outlying banks are in fact competitors of the large Houston banks. This lack of data assumes greater significance in light of the state prohibitions against branch banking and in light of the claim made in the application that the effect of the merger on retail competition will be insubstantial because both merging banks are primarily "wholesale" banks and because the retail customers of Southern National will find readily available alternatives in the banks which will remain in Houston and its suburbs after the merger.

In view of the unit nature of banking in Texas, the preeminence of Houston and Harris County in terms of population, commerce and industry, and lack of specific information in the application as to the origin of the business of the merging banks, a realistic appraisal of relevant banking markets would seem to require that Houston and Harris County as well as the broader metropolitan area each be con-

sidered as appropriate sections of the country in which to analyze the effect of the proposed merger on competition.

Competition Between the Merging Banks

Notwithstanding the close physical proximity of the merging banks and despite their characterization in the application as being primarily the same type of bank, it is asserted that the amount of competition which will be eliminated by the merger is insubstantial. This conclusion appears to be based on the assertions (1) that both banks are primarily "wholesale" banks and that "the great bulk of the competition between First City and Southern is for wholesale business," and (2) that Southern National's retail business is small and that since a number of banking alternatives will remain in Houston and the suburbs for retail customers, the elimination of Southern National will be without significant effect on the retail market.

These arguments appear to be flawed in a number of respects. "Wholesale banking," an imprecise term at best, is not defined in the application beyond the assertion that any loan or deposit of a size over $100,000 is "wholesale" business. Further, such wholesale business is arbitrarily assumed in the application to be solely "national" business. There are no data in the application regarding the amounts of "wholesale" business done by other area banks and the various figures given in the application for the wholesale-national business of the merging banks are contradictory. For example, it is asserted (p. 64), that Southern National has 90 individual and commercial demand deposits in amounts of $100,000 and over which total $40,492,000 and that 30 of these accounts, amounting to $17,382,000, are "national" accounts because they have headquarters outside the

Houston metropolitan area. On the other hand, Appendix A, which purports to allocate the local and national business of the merging banks, assigns all 90 of Southern National's demand accounts of $100,000 and over to the national area, despite the fact that 60 such accounts have headquarters in Houston. A similar inconsistency appears in the comparable figures given in the application for First City. Thus, the data contained in the application will not support an inference that customers with demand deposit accounts of $100,000 and over can turn to banks located in other parts of the country as alternative sources of banking services.

Moreover, even if the arbitrary division between large and small business employed in the application is accepted, it cannot be said that Southern National's $25 million of individual and commercial demand deposit accounts under $100,000 constitutes an insignificant share in the local market where only 20 banks among the 115 listed in the application as competitors in the Houston SMSA have total deposits exceeding $25 million. In any event, it must be assumed, absent evidence to the contrary, that the $25 million of such deposits held by Southern National were gained in direct competition with First City, which holds $106 million in such deposits, and that this substantial amount of direct competition would be eliminated by the merger.

Direct competition also exists between the merging banks at all levels for other types of commercial banking business. It is clear that they compete with each other for substantial amounts of large-sized loans and deposits of all types. Both have substantial construction loan businesses. Both are active in the consumer loan area. Both have extensive correspondent systems. An analysis of the loan portfolios

of the merging banks shows that of First City's total loans of $426,119,000 as of April 5, 1966, only $76,466,000 were in categories of loans (primarily to financial institutions) not also then outstanding at Southern National. Conversely, none of the $45,638,000 in total loans held by Southern National as of April 5, 1966 were in categories of loans not then also outstanding at First City. The similarities in the deposit accounts of the merging banks are even more pronounced. Both banks offer trust services, although the trust business of Southern National is relatively small.

Finally, the close physical proximity of the offices of the merging banks would seem to insure, absent evidence to the contrary, that a substantial portion of the business of each bank is done with individuals and businesses located in downtown Houston for which the two banks represent equally convenient banking alternatives.

Probable Effects of the Merger

The relative competitive positions of the larger Houston commercial banks are shown in the table below. It should be noted, however, that the table does not fully reflect the competitive realities of the local market. The three largest Houston banks, including First City, are reported to have close ties through stock ownership and personnel interlocks with many of the smaller banks in Houston. Thus, actual concentration of banking resources is greater, and the number of competitive alternatives is correspondingly less, than would appear from the number of separately-chartered banks in the area. This factor must be given careful consideration in evaluating the competitive situation in Houston. However, little information on the extent of such interrelations is

given in the application and we do not have complete data regarding them from other sources. The application does reflect the existence of interlocks between First City and seven state-chartered banks listed in the application as competitors of First City. We believe that First City may also have close ties with at least six additional state-chartered banks among those listed in the application as competitors. The application also reflects an interlock between Southern National and one of the listed competitors. Finally, the second and third largest banks in Houston are reported to have close ties with a total of eleven of the smaller banks listed in the application as area competitors.

[Dollar amounts in millions]

Rank	Name	Total deposits (amount)	Percent of Houston	Percent of Harris	Percent of SMSA
1	FIRST CITY	$911.7	26.2	24.6	23.4
6	SOUTHERN NATIONAL	77.6	2.2	2.1	2.0
(1)	(Resulting Bank)	989.3	28.4	26.7	25.4
2	Texas National	709.1	20.4	19.1	18.2
3	Bank of the Southwest	587.4	16.9	15.8	15.0
4	Houston National	169.4	4.9	4.6	4.3
5	Houston Bank & Trust	82.3	2.4	2.2	2.1
	Total, 6 largest banks	$2,537.5	73.0	68.4	65.0
7	Continental Bank & Trust	64.3	1.8	1.7	1.6
8	Bank of Texas	60.5	1.7	1.6	1.6
9	Citizens State	51.3	1.5	1.4	1.3
10	Fanin Bank	51.8	1.5	1.4	1.3
	Total, 10 largest banks	$2,765.4	79.5	74.6	70.9
	Total, 62 banks in Houston	$3,477.1	100.0	93.8	89.1
	Total, 85 Banks in Harris County	$3,706.8		100.0	95.0
	Total, 115 banks in SMSA	$3,900.5			100.0

NOTE.—Detail may not always add to total due to rounding.
Sources: Application and Polk's, March 1966 ed.

As the above table shows, First City and Southern National are substantial competitive factors in the City of Houston, in Harris County and in the Houston metropolitan area. Their combination would give the resulting bank more than one-fourth of the total commercial banking deposits held by the 114 banks that will remain in the metropolitan area after the merger. Six banks presently account for approxi-

mately 65 per cent of the commercial bank assets, deposits and loans in the SMSA and the three largest Houston banks together hold about 57 per cent of the entire area's assets and deposits and more than 60 percent of its loans (without giving effect to the existence of the close ties between the three largest banks and their many smaller satellites). The merger would reduce the number of independent banks which control these large shares of the area's bank resources to five.

Borrowers in the area whose banking requirements might not be satisfactorily met by the resources of the smaller banks would be deprived by this merger of one of the few substantial competitive sources of such credit. Smaller individual and business borrowers and depositors in the downtown Houston area would lose one of their few readily-accessible bank alternatives. The merger would also eliminate one of the few downtown Houston banks with the capacity to act as city correspondent for the many country banks in Texas which require a correspondent in Houston.

The increase in concentration that will result from the proposed merger is significant in relation to the existing concentrated banking structure in the Houston area. This concentration is in large measure a direct result of four mergers among Houston banks since 1953. Three of these prior mergers combined the then six largest downtown banks into what are now the two largest institutions, and the fourth and most recent merger resulted in what is presently the fourth largest bank in Houston. First City's 1956 merger combined two institutions having assets of \$348,317,000 and \$333,943,000, respectively. The largest previous merger—which produced the Texas National Bank of Commerce with \$862 million in

resources—will be eclipsed by the presently proposed merger with its resulting $1,100,366,000 in total resources.

The applicant banks urge that any increase in concentration resulting from their merger should be weighed against what they discern to be a gradual trend toward deconcentration in the Houston metropolitan area in the last ten years, a trend attributable in part to the entry of forty-six new commercial banks (41 of these in Houston and Harris County) which have all experienced steady growth. The application gives the following figures as descriptive of this trend: In Harris County in 1956, the three top banks held 65.8 per cent of assets, 65.6 per cent of loans, and 64.8 per cent of deposits, while in 1965 the top three held 60.3 per cent of assets, 57.1 per cent of loans, and 59.5 per cent of deposits (figures given in the application for the Houston SMSA show similar changes). The applicants seem to be suggesting that any increase in concentration brought about by their proposed merger can only be temporary because the long-term trend in the area is toward deconcentration.

This analysis overlooks the fact, pointed out above, that many of the new commercial banks are affiliated with the largest Houston banks. While precise data as to the extent of such affiliations is not presently available to us, it is clear that if affiliated banks were considered as single institutions, the purported decrease in concentration would be lower and that, in fact, a net increase in concentration might be evident. Moreover, regardless of the purported decrease in banking concentration in the Houston area, it is clear that this merger would further increase the disproportionate size and dominant position of First City.

Thirty-four of the forty-six newcomers during the last ten years each have less than $10 million in deposits, only four have more than $25 million in deposits, and the largest and most vigorous of these new entrants—Southern National—will be eliminated by the proposed merger. It is a striking fact that despite the unit nature of Texas banking, and despite the large numbers of newcomers and existing banks, more than 70 per cent of the SMSA's commercial bank assets, loans and deposits remain in the hands of only ten banks, and nearly one-fourth of the entire area's assets and deposits and 19 per cent of its loans are held by one bank—First City.

The principal reasons urged in support of the merger are that the growing Houston metropolitan area needs a larger bank to serve local customers who must presently look to other cities for banks large enough to accommodate their requirements, and that enlargement of First City's lending limit as a result of the merger would help meet such local needs by permitting First City to make loans which in the past it has been forced to decline or to participate; that First City has a serious management succession problem which could best be met by the management that could be brought to the merged bank by Southern National; and that the merged bank could offer many new and expanded services such as extended area computer services and general international banking services. As to the first of these reasons, we think it is clear that the alleged increased ability of the resulting bank to serve the very largest customers—many of whom are already capable of obtaining their banking needs from institutions in other cities—cannot justify the lessening of competition for the business of those customers who cannot turn to banks in other cities and who must therefore rely on banks located in the

Houston area. Moreover, we note that First City's relatively low loan-deposit ratio—44% as of December 31, 1965—indicates that First City is capable of substantially increasing its loan volume within the limits of its present resources. As to the second and third reasons for the merger, we are convinced that a bank with the resources of First City is fully capable of solving problems of management succession and the need to offer new services, by means less injurious to competition than the proposed merger.

Conclusion

The proposed merger would eliminate substantial competition between the participating banks and appreciably increase concentration in a market whose present highly concentrated structure is due in large part to previous mergers among its largest banks, including the applicant First City. We conclude that the proposed merger would have a serious adverse effect upon competition in the Houston area.

A summary of this report is attached.

Sincerely yours,

DONALD F. TURNER,
Assistant Attorney General, Antitrust Division.

SUMMARY OF THE REPORT OF THE DEPARTMENT OF JUSTICE ON THE COMPETITIVE FACTORS INVOLVED IN THE PROPOSED MERGER OF FIRST CITY NATIONAL BANK OF HOUSTON, HOUSTON, TEXAS, AND SOUTHERN NATIONAL BANK OF HOUSTON, HOUSTON, TEXAS

First City is the largest commercial bank in Houston, with assets of $966,535,000, deposits of $850,843,000, and loans of $426,119,000. Southern National is the sixth largest bank in Houston, with assets of $81,761,000, deposits of $66,309,000 and loans of $45,638,000. Both banks offer trust services and both have

extensive correspondent bank activities. The banking houses of the participating banks are located directly across the street from one another in downtown Houston.

The Houston metropolitan area is the thirteenth largest metropolitan area in the United States and encompasses Harris County, in which Houston is located, and the four adjoining counties of Brazoria, Fort Bend, Liberty, and Montgomery. There are 115 commercial banks located in the metropolitan area and the ten largest are located in the City of Houston. The three largest of Houston's banks together hold about 57 per cent of the entire area's commercial bank deposits; in Harris County they hold about 60 per cent of deposits; and in the City of Houston they hold about 63 per cent of deposits (not taking into account the banking resources of twenty-two smaller banks which are closely associated with these three dominant banks). This heavy concentration in the several areas involved is due in large part to four mergers in Houston in the last ten years. Three of these prior mergers combined the then six largest downtown banks into what are now the two largest institutions, and the fourth merger resulted in what is now Houston's fourth largest bank. First City, a participant in one of these earlier mergers, resulted from the combination of two institutions having assets of $348,-317,000 and $333,943,000, respectively. First City now holds more than 23 per cent of the deposits held by all 115 commercial banks in the metropolitan area. Southern National, which has grown rapidly since its opening in 1960, now holds 2 per cent of the deposits held by all 115 commercial banks in the metropolitan area.

The proposed merger would eliminate a substantial volume of direct competition between the participat-

ing banks and appreciably increase concentration in the already highly concentrated banking areas of Houston, Harris County, and the Houston metropolitan area. We conclude that the effect of the proposed merger on competition would be seriously adverse.

U.S. GOVERNMENT PRINTING OFFICE: 1967

No. 914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

UNITED STATES OF AMERICA,
Appellant,

v.

FIRST CITY NATIONAL BANK OF HOUSTON,
SOUTHERN NATIONAL BANK OF HOUSTON, AND
WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF OF APPELLEES, FIRST CITY NATIONAL BANK OF HOUSTON AND SOUTHERN NATIONAL BANK OF HOUSTON

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No. 914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

UNITED STATES OF AMERICA,

Appellant,

v.

FIRST CITY NATIONAL BANK OF HOUSTON,
SOUTHERN NATIONAL BANK OF HOUSTON, AND
WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF OF APPELLEES, FIRST CITY NATIONAL BANK OF HOUSTON AND SOUTHERN NATIONAL BANK OF HOUSTON

OPINION BELOW

The judgment of the district court (App. pp. 4a-5a) dismissing the plaintiff's complaint was entered without formal opinion. The district judge's oral remarks made immediately before the announcement of his decision are reprinted in 1967 Trade Cas. ¶ 71,970 (App. pp. 2a-3a)

QUESTION PRESENTED

The first question which the Department of Justice asserts is presented before this Court by appeals Nos. 914 and 972 is not appropriate for No. 914 which was dismissed on the pleadings before any question of burden of proof was reached. The question presented is properly stated:

Whether the Bank Merger Act of 1966 requires the Department of Justice, in an antitrust suit seeking to enjoin a bank merger, to allege facts in its complaint establishing that the merger will have anticompetitive effects which are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

STATEMENT

This appeal presents the first challenge of a merger approved under the standards of the Bank Merger Act of 1966, 12 U.S.C. § 1828(c), to reach this Court. All parties apparently agree that the Bank Merger Act of 1966 significantly amends in a number of ways the Bank Merger Act of 1960, 74 Stat. 129. Under the new Act consummation of mergers is delayed for 29 days after approval by the responsible banking agency. The Department of Justice (Department) is thereby given additional time to review the proposed merger and, if it deems necessary, to file suit. 12 U.S.C. § 1828(c)(6).

A statute of limitations is imposed. If the Department does not file suit prior to the earliest time at which the merger can be consummated, it is barred from filing suit. An automatic statutory stay of the effectiveness of agency approval is provided, thus giving the Department a preliminary injunction against the merger with the mere filing of its complaint. Perhaps the most significant amendment, however, is the requirement that, except for cases brought under section 2 of the Sherman Act, 15 U.S.C. § 2, a court reviewing the Comptroller of the Currency's (Comptroller) decision approving a merger application is required to

apply standards identical with those applied by the Comptroller in evaluating the merger.[1] This is, of course, directly contrary to the construction of the Bank Merger Act of 1960 where it was proper for a banking agency to approve a merger under the test set forth by that Act and for the Department subsequently to attack the merger in court under the differing standards of the antitrust laws. *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

The mandatory test to be applied is set forth in 12 U.S.C. § 1828(c)(5):

> The responsible agency shall not approve —
>
> (A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or
>
> (B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.
>
> In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

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[1] In section 2 cases the standards of the Bank Merger Act of 1966 are inapplicable. The courts continue to look to section 2 of the Sherman Act. See 12 U.S.C. § 1828(c)(7)(B).

The test under the 1966 Act corresponds with that under the Bank Merger Act of 1960 in that the ultimate issue which the appropriate banking agency must reach is: whether the proposed merger is in the public interest.[2] The only salient difference between the processes for resolution of the ultimate issue under the respective acts is that greater weight must be given to anticompetitive effects under the 1966 Act. The ultimate issue as to whether the proposed merger is in the public interest remains the same.

Pursuant to the requirements of the Bank Merger Act of 1966, First City National Bank of Houston (First City) and Southern National Bank of Houston (Southern) filed an application with the Comptroller of the Currency for approval to merge (Defendants' Exhibit 1). As required by the Comptroller, the application contained detailed financial data on the merging banks and an extensive economic brief, including an exhaustive treatment by the banks

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[2] Except for cases where a monopoly charge is filed under paragraph 5(A) of the Bank Merger Act of 1966. In such cases the public interest is not considered.

The 1960 Act, 74 Stat. 129, 12 U.S.C. § 1828(c), provided in pertinent part:

> "In granting or withholding consent under this subsection, the Comptroller, the Board, or the Corporation, as the case may be, shall consider the financial history and condition of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served, and whether or not its corporate powers are consistent with the purposes of this chapter. In the case of a merger, consolidation, acquisition of assets, or assumption of liabilities, the appropriate agency shall also take into consideration the effect of the transaction on competition (including any tendency toward monopoly), and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest."

See also H.R. Rep. No. 1416, 86th Cong., 2d Sess. 10-12 (1960).

of what they considered to be the effects in meeting the convenience and needs of the community to be served. Complete copies of this application were furnished to the Department by the defendant banks. Thereafter, defendant banks filed an extensive supplemental memorandum with the Department (Defendants' Exhibit 2), which was also furnished to the Comptroller of the Currency and made a part of the record before him.

The Comptroller received the statutorily required advisory opinions from the banking agencies and the Department. The Regional Administrator of National Banks for the Eleventh District recommended approval of the merger on the basis that his examination showed little competitive impact and great benefits to the community to be served. The Department advised that the proposed merger would have a serious adverse effect upon competition in the Houston area (Defendants' Exhibit 3). The Board of Governors of the Federal Reserve System advised that the overall competitive effect of the proposal would be adverse (Defendants' Exhibit 4). The Board of Directors of the Federal Deposit Insurance Corporation advised that it did not appear that the consummation of the merger would have a substantial anticompetitive effect (Defendants' Exhibit 5).

After consideration of the extensive evidence adduced before him together with various agency reports the Comptroller of the Currency on September 20, 1966, approved the application to merge concluding:

> [T]he probable effect of the proposed merger upon competition is clearly outweighed in the public interest by the probable beneficial effects of the merger upon the convenience and needs of the community to be served by First City National Bank. (Defendants' Exhibit 6).

The Comptroller's decision of September 20, 1966, was supplemented by a formal opinion on November 10, 1966 (Defendants' Exhibit 7), and by a supplemental opinion enlarging upon the analysis in the November opinion on December 1, 1966 (Defendants' Exhibit 8). Thus the agencies involved split evenly on the anticompetitive effects of the merger: the Federal Reserve Board and the Department finding them adverse; the F.D.I.C. and the Comptroller finding them not adverse.

On October 18, 1966, the Department filed suit alleging, without reference to the Bank Merger Act of 1966, that the proposed merger of Southern and First City would violate section 7 of the Clayton Act. The Comptroller of the Currency was given leave to intervene by order of the district court. The Comptroller thereupon filed an answer to the complaint of the Department of Justice and moved to dismiss on the ground that the complaint of the Department failed to state a claim under the Bank Merger Act of 1966. Thereafter, First City and Southern moved for dissolution of the automatic statutory stay which arose pursuant to paragraph (7)(A) of the Bank Merger Act of 1966 upon commencement of the action by the Department of Justice.

After introduction of extensive evidence by the banks in support of their motion and argument by all parties on their respective motions, the district court concluded that, in order to allege properly a violation of the Bank Merger Act of 1966, the Department is required to plead that the anticompetitive effects of the proposed merger are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. The district judge stated that he was reluctant to dismiss on the pleadings and allowed the Department ten days to amend its com-

plaint, indicating that he would be willing to extend more time if necessary (App. p. 3a). Although well aware that the judge was dismissing the case on the narrow point of failure to allege facts sufficient to base a claim under the Bank Merger Act of 1966, the Department refused to amend, electing to stand on its position that it could bring suit under section 7 of the Clayton Act. It thereby brought this narrow pleading question up on appeal. It deliberately accepted the risks of standing on its pleadings even though six district courts had held that the Department could not stand on section 7 of the Clayton Act but must bring its case under the controlling statute, the Bank Merger Act of 1966.[3]

The Department has altered its position from that taken before the trial court. It now concedes that the Bank Merger Act of 1966 has created a new standard of legality which is controlling in bank merger cases. See, *e.g.*, Department's Brief pp. 11, 31-32. However, this case must be resolved on the basis of the complaint filed in the trial court which relied nakedly on section 7 of the Clayton Act without reference to the Bank Merger Act of 1966 and the test set forth therein. (See App. B, Department's Brief). It cannot amend that complaint before this Court for purposes of argument.

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[3] The instant case and: United States v. Mercantile Trust Co., 5 Trade Reg. Rep. (1966 Trade Cas.) ¶............ (E.D. Mo. Dec. 19, 1966) (Dismissed on Pleadings); United States v. Third Nat'l Bank of Nashville, 5 Trade Reg. Rep. (1966 Trade Cas.) ¶71,934 (M.D. Tenn. Nov. 22, 1966) (Trial on Merits); United States v. Provident Nat'l Bank, 15 Trade Reg. Rep. (1966 Trade Cas.) ¶71,931 (E.D. Pa. Oct. 13, 1966) (Holding in denying motion to dismiss); United States v. Crocker-Anglo Nat'l Bank, 5 Trade Reg. Rep. (1966 Trade Cas.) ¶71,898 (N.D. Cal. Oct. 6, 1966) (Decision remanding cause to Comptroller); United States v. First Nat'l Bank of Hawaii, Civ. No. 2540 (D. Hawaii 1966) (Oral Opinion of October 31, 1966, Transcript at 91-94) (Holding on denial of motion to dismiss.)

SUMMARY OF THE ARGUMENT

1. The trial court dismissed the Department's complaint on the pleadings on the ground that the Department had failed to allege sufficient facts to state a claim under the controlling statute, the Bank Merger Act of 1966. The trial court expressly limited its holding to the burden of pleading and the Department concurred with the trial court that this was the extent of its holding. Since the burden of proof and burden of pleading are separable, the trial court did not necessarily decide the burden of proof in sustaining the motion to dismiss.

2. The burden of pleading both elements of the statutory test set forth in the Bank Merger Act of 1966, is clearly upon the Department. It must allege facts establishing that the merger will have anticompetitive effects which are not clearly outweighed in the public interest. This is essential to raise the ultimate issue: whether the merger is in the public interest. The language of the statute provides explicitly that the public convenience and needs are to be considered in "every case". Thus, consideration of the public interest cannot be treated as a special exception to be raised only by defensive pleading.

3. The provision of the Bank Merger Act of 1966 covering the public interest is so incorporated with the statutory definition of the offense that the elements of the offense cannot be accurately and clearly described when the provision is omitted. It is clear that consideration of the convenience and needs is an integral element in the test set forth by the Bank Merger Act of 1966 and is not legally an exception. The rules of pleading require that a plaintiff relying on the statutory test must allege sufficient facts to show that the defendant is not within the provision. The Department cites no authority contrary to this proposi-

tion. Its cases deal with provisions which both structurally and from the purpose of the statutes and instruments involved are obviously special exceptions which need not be negatived by a plaintiff. They provide no asistance in determining whether consideration of the convenience and needs is a special exception or is an integral element of the statutory test — the initial and crucial determination which this Court must make.

4. The legislative history of the Bank Merger Act of 1966 clearly demonstrates that the paramount purpose of the Act was to establish a single set of standards for consideration of future mergers by the banking agencies, the Department and the courts. Only by requiring the Department to plead both elements of the statutory test can the congressional purpose of creating a single standard for the agencies, the Department and the courts be achieved. Otherwise, it would be possible for an agency to approve a merger under the standards of the Bank Merger Act of 1966 and for the Department to attack it under differing standards, as was the case under the Bank Merger Act of 1960. This pleading question is particularly vital since the mere institution of suit by the Department creates an automatic statutory stay of the merger. Congress cannot have intended that the Department become entitled to an automatic injunction without even having the burden of alleging all of the facts necessary to demonstrate a violation of the controlling statute.

5. In the event that this case should be remanded because of a determination that it was improperly dismissed on the pleadings, the statutory stay should not revive. The uncontroverted evidence adduced before the trial court in support of the motion to dissolve the stay provides an adequate ground for affirming the dissolution of the statutory stay.

ARGUMENT

I. The District Court Decided Only the Pleading Question of What Facts the Department Must Allege to Attack Properly a Merger Approved Under the Bank Merger Act of 1966.

The only action of the trial court before this Court for review in No. 914 is its judgment on the pleadings granting the Comptroller's Motion to Dismiss. The Comptroller's motion was predicated on the premise that the complaint failed "to state facts sufficient to support a cause of action." The judge's explanatory remarks make it clear that, while he considered other courts to have held that the burden of proof on determination of the public interest is on the Department, he based his dismissal solely on the fact that the Department had failed to plead sufficient facts to invoke the test as set forth in the Bank Merger Act of 1966 (App. pp. 1a-2a).

During the hearing, the trial judge, obviously concerned with the position of the Department which was forcing him to dismiss on a narrow pleading question, three times interrogated the Department's trial attorney to ascertain if they were in agreement that only a pleading issue was before the court, once specifically disavowing concern with the burden of proof. (App. p. 1a). The Department's trial attorney three times concurred that only a pleading issue was involved. (App. pp. 1a-2a).

The Department now takes the position that the district judge not only decided what pleadings were requisite, but also decided where the burden of proof lay. The transcript of the proceedings below demonstrates that the district judge did not intend to make any such decision and that indeed the Department of Justice at the trial stage con-

curred with his understanding that he was deciding only where the burden of pleading lay.

The only possible justification for the Department's position before this Court would be the argument that the dismissal of its complaint for the failure to plead that the anticompetitive effects of the proposed merger are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served is necessarily a decision that the Department has the burden of proof on this issue. This proposition is clearly incorrect. While the burden of pleading and the burden of proof usually correspond, they do not necessarily do so. *Palmer* v. *Hoffman,* 318 U.S. 109, 117 (1943); *New York Cent. & H. R. R. Co.* v. *United States,* 165 Fed. 833, 839 (1st Cir. 1908); Clark, Code Pleading § 96 at 610 (2d ed. 1947); Annot., 130 A.L.R. 440, 480 (1941). Thus, a court dismissing a complaint for insufficient pleading does not thereby decide the burden of proof. The question remained open. For example, the Department could have simply plead in the alternative. Fed.R.Civ.P. 8(e). It could have argued, relying on the same authorities which it urges before this Court, that despite its burden of pleading, the burden of proof fell upon the defendants. 9 Wigmore, Evidence § 2485 at 273 (3rd ed. 1940).

This appeal is markedly distinguished from No. 972, *United States* v. *Provident National Bank.* Although motions to dismiss on the pleadings were made in *Provident,* they were denied (5 Trade Reg. Rep. ¶ 71,934.) The Department's case was dismissed on motion for final judgment, not because of pleading defects, but because the Department advised the trial court that it would refuse to meet the burden of proof placed on it and would refuse to

honor the scope of review which the trial court had concluded was appropriate (5 Trade Reg. Rep. ¶ 71,895).[4] In the present case (No. 914) the trial court did not reach the "review de novo" question, but merely held that the pleading was insufficient because it did not invoke the full test of the Bank Merger Act of 1966.[5]

II. The Burden Of Pleading All Elements Of The Statutory Test Set Forth By The Bank Merger Act Of 1966 Is On The Department Of Justice.

Undisputedly a complainant seeking to rely on a statute must allege facts sufficient to state a claim upon which relief can be granted. Fed.R.Civ.P.8(a); Fed.R.Civ.P.12. The Department has failed to state such a claim. The Department has alleged only that the proposed merger would have

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[4] The trial court in No. 972 (*Provident* case) characterized the Department's position as follows:

> "The court, therefore, finds that since Justice has definitely refused to try its case under BMA-66, the banks should not be subjected to the expense and inconvenience of a trial when Justice refuses to prove other than admitted facts to establish its case. Its position has been taken deliberately and directly in opposition to the ruling of the court of October 13, 1966 and is consistent with the position of the Government on a Nationwide basis, even though the Courts have been unanimous in refusing to accept its contention. (citations omitted)" 5 Trade Reg. Rep. (1966 Trade Cas.) ¶71,985 at 83,484.

[5] The Department argues at great length as to what the proper scope of review should be under the Act because of "the contention" that Congress intended to limit the courts to a review function under the Act. (Department's Brief p. 23.) The appropriate scope of review was not determined by the trial court in No. 914. Determination of the scope of review is not necessary to determine the propriety of the trial court's dismissal on the pleadings. Accordingly, we have made no contention with regard to scope of review and do not join issue with the Department.

anticompetitive consequences in violation of section 7 of the Clayton Act[6] and has made no allegations that the anticompetitive consequences are not clearly outweighed by the benefits in the public interest. If the determination of whether the anticompetitive effects are clearly outweighed in the public interest is an integral element of the statutory test set forth by the Bank Merger Act of 1966, the Department's pleadings are fatally defective. It has failed to allege facts sufficient to state a claim under the Bank Merger Act of 1966. . .

Clearly then, the critical decision to be made by this Court is whether the determination that the anticompetitive effects are clearly outweighed in the public interest is an integral element of the test which must be considered in every case or is a special exception merely raising the possibility of an affirmative defense by the defendants. The Department's brief is of little assistance in making this decision. As we shall subsequently demonstrate, the authorities on which it relies are concerned with the hornbook principles that a special exception to the prohibitions of a statute need not be negatived by the pleadings of one who relies on the statute and the burden of proof lies on the party who seeks to benefit from the special exception. They are of no assistance in making the initial and critical determination whether the requirement in question is an integral element of the statutory test or is a special exception.

We submit that the plain meaning, the structure, and the legislative history of the Bank Merger Act of 1966 all demonstrate that the determination whether the anticompetitive effects are clearly outweighed in the public interest is an integral element of the test set forth by the Act. Since

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[6] It should be noted, that contrary to the Department's assertion (Department's Brief, p. 49), the Bank Merger Act standards do not incorporate section 7 verbatim. The language "in any line of commerce" was deliberately and, purposefully omitted. 112 Cong. Rec. 2541 (Daily ed.).

this determination is an integral element of the definition of an offense and not a special exception, the Department has the burden of pleading that the anticompetitive effects of a challenged merger are not clearly outweighed in the public interest.

The statutory standard defining a violation of the Act is contained in one general clause with the requirement of consideration of the public interest contained as an intrinsic part of that clause. The Act provides in paragraph (5)(B) that a responsible agency shall not approve:

> any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.
>
> In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

Paragraph (7)(B) explicitly requires the courts to apply identical standards in reviewing an agency approval except in monopoly cases brought under section 2 of the Sherman Act. 12 U.S.C. § 1828(c)(7)(B). The weighing of the benefits to the convenience and needs of the community is an integral element of the statute. It is no special exception to be considered only when raised as a defensive issue by the defendants — the statute explicitly requires: "In *every* case, the responsible agency shall take into consideration . . . the convenience and needs of the community to be served." (Em-

phasis supplied.) Thus to apply standards identical to those of the responsible agency, as the statute requires, the courts must in *every* case take into consideration the convenience and needs of the community to be served.

The function of the banking agencies and the courts resembles that of the Interstate Commerce Commission which in evaluating railroad mergers while giving weight to anticompetitive facts must reach in every case "the ultimate question whether the merger would be consistent with public interest despite the foreseeable injury to competition." *Seaboard Air Line R.R.* v. *United States,* 382 U.S. 154, 156 (1965).[7]

The Department's analysis of the decisional process required of a court under the Bank Merger Act of 1966 recognizes that the determination whether the anticompetitive effects are clearly outweighed in the public interest is an integral element of the statutory test and must be made by the court in every case — not merely where it is raised as an affirmative defense. It described the "steps that must be followed in applying the standard of the Act to a particular case" as follows:

> "(1) The first determination the court must make is whether the challenged merger's 'effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade * * *.'
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> * * *

[7] Congressman Moorehead, one of the principal proponents of the Bank Merger Act cited *Seaboard* and *McLean Trucking Co.* v. *United States,* 321 U.S. 67 (1944) as appropriate precedents for the function of the responsible banking agencies contemplated under the Bank Merger Act. 112 Cong. Rec. (Daily ed.) 2340. See *United States* v. *Crocker-Anglo Nat'l Bank,* 5 Trade Reg. Rep. (1966 Trade Cas.) ¶ 71,898 at 83,156 (N.D. Cal. Oct. 6, 1966).

"(2) If such an effect is found, the court must next consider 'the probable effect of the transaction in meeting the convenience and needs of the community to be served.'

* * *

"(3) Once the court has determined whether the merger will in fact produce any benefits within the scope of the convenience and needs defense, it must next consider whether the challenged merger is necessary to achieve them.

* * *

"(4) Only after appraising the claimed benefits of the merger will the court be prepared to perform the ultimate act of judgment required by the Bank Merger Act — that of weighing the competitive harms of the challenged merger against considerations of community convenience and need." (Department's Brief pp. 42-45. See also Department's Brief p. 39).

As the Department described it, competitive effect is merely "one-half of the equation" (Department's Brief p. 48).[8] Surely the Department cannot state a claim for relief under the Bank Merger Act of 1966 without alleging facts sufficient to satisfy the other one-half of the equation.

It has long been settled law that where a statute contains a provision in the grammatical form of an exception within a section defining an offense, which is so incorporated with the definition of the offense that the elements of the offense cannot be accurately and clearly described if the provision is omitted, the rules of pleading require that a plaintiff relying on the statute must allege sufficient facts to show that the defendant is not within the provision. The provision

[8] The trial judge's analysis agrees with the Solicitor General's analysis, though he conceptualized the Act's requirements as "steps" rather than parts of an equation:

"I think that the petition fails to state a cause of action in that it alleges only the first step and not the second step which is necessary for the plaintiff to support" (App. p. 3a).

is simply not an exception in a real or legal sense. *United States* v. *Cook,* 84 U.S. 168, 173 (1872); *Maxwell Land Grant Co.* v. *Dawson,* 151 U.S. 586, 604 (1894); *Seese* v. *Bethlehem Steel Co.,* 74 F. Supp. 412, 416 (D. Md. 1947), *aff'd,* 168 F. 2d 58 (4th Cir. 1948); *Grand Trunk Ry. Co.* v. *United States,* 229 Fed. 116, 119 (7th Cir. 1916); *United States* v. *Oregon Short Line R. Co.,* 160 Fed. 526, 528 (D. Idaho 1908).[9]

Applying this test to the Bank Merger Act of 1966, it is clear that consideration of the convenience and needs is so incorporated with the language defining the offense that the standards for what constitutes a violation of the Act cannot be adequately defined without reference to this factor. The public convenience and needs are to be considered in the words of the statute "in every case". This consideration is not a narrow exception applicable to some small class of cases where it is raised by defensive pleading. It is an integral element of the decisional process which must be utilized by both the appropriate banking agency and by the courts if the mandate of the statute for determination of the public interest is to be honored. It does not constitute an exception to the general definition of the offense prohibited by the Act — it is an inseparable part of that definition.

The Department cites no authority contrary to the proposition that the test set forth in *United States* v. *Cook* and the other authorities cited above, should control in determining whether consideration of the convenience and needs is an integral element of the statutory test set forth in the Bank Merger Act of 1966 or is a special exception, which need not be plead. Its authorities are concerned with pro-

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[9] See generally the cases cited in Annot., *Burden of allegation and proof in civil causes as regards exception in statute,* 130 A.L.R. 440 (1941); Annot., 3 A.L.R. 2d 1097, 1143-44 (1949).

visions which are clearly, both from the purposes and structure of the instrument or statute involved, special exceptions which need not be plead by the party relying on the statute or instrument. They are of no aid in making the determination which this Court must make: whether consideration of the convenience and needs is an integral element of the statutory test or is a special exception.

Javierre v. *Central Altagracia, Inc.*, 217 U.S. 502 (1910), is a contract case concerning a condition subsequent embodied in a typewritten proviso added to the fourteenth clause of a printed sugar cane milling contract, 3 Puerto Rico Fed. Rep. 256, 261 (D. Mayaguez 1908) — not a grammatical "exception" embodied within the general clause of a statute defining an offense. *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948), involves an exception contained in a proviso in a subsequent substantive provision of the Robinson-Patman Act, which explicitly provides that the burden of proof is on one who seeks to benefit from the exception. 334 U.S. at 45. *Nicoli* v. *Briggs*, 83 F. 2d 375 (10th Cir. 1936), involved a deportation hearing conducted under a warrant of arrest which recited that the defendant was "not within any exception" of the relevant statute. The relevant act, 8 U.S.C. § 156a, provided for the deportation of any alien convicted of violating the narcotics laws, with a narrow special exception carved out for addicts who were not dealers in or peddlers of narcotic drugs. Far from conflicting with *United States* v. *Cook, supra,* all three cases rely on it as authority. *Nicoli* explicitly demonstrates that *Javierre* and *McKelvey* v. *United States*, 260 U.S. 353 (1922) (upon which the Department also seeks to rely) are not contrary to *Cook:*

> "One sentence in United States v. Cook, 17 Wall. 168, 21 L. Ed. 538, is cited contra. That opinion, read as a whole, does not appear to be at variance with the later case of McKelvey v. United States, supra. It holds, as we read it, that if it is impossible to frame the statu-

tory charge without negativing the exception, then it should be negatived; but where, as here, the statute states a clear, definite, and general offense, and then excepts certain classes or acts from its scope, the exception need not be negatived." 83 F. 2d at 379.

United States v. *King & Howe, Inc.*, 78 F. 2d 693 (2d Cir. 1935), which also relies on *United States* v. *Cook* as authority, simply follows the general rule that where an exception is not a part of the general clause defining an offense, but is contained in a subsequent provision of the statute, the exception need not be plead by the party relying on the general clause of the statute. Annot., 130 A.L.R. 440, 443 (1941). However, the Second Circuit clearly implies in *King & Howe* that if the statute contained the exception within the general clause, as did the applicable regulation, this would have been evidence that the United States should be required to negate the exception in its pleadings. 78 F. 2d at 696. *United States* v. *Fleischman*, 339 U.S. 349 (1950), involves "the familiar doctrine in criminal cases that 'it is not incumbent on the prosecution to adduce positive evidence to support a negative averment . . .'" It concerns only the burden of proof, not the burden of pleading which is at issue here.

The legislative history of the Bank Merger Act of 1966 is clouded by conflicts in the strongly partisan positions taken by the bill's proponents and opponents as to its proper interpretation. On one point, however, there is no controversy. The bill was designed to eliminate the conflict caused by the variant standards applied in evaluating bank mergers by the Department of Justice and the various banking administrative agencies. As the House Committee on Banking and Currency stated in its report:

"The bill would establish a single set of standards for the consideration of future mergers by the banking

supervisory agencies, the Department of Justice and the courts under the antitrust laws — standards stricter than those in the Bank Merger Act [of 1960], but which include both the effect of the merger on competition and the convenience and needs of the community to be served. . . ." H.R. Rep. No. 1221, 89th Cong., 2d Sess. 1 (1966).

Congressman Patman, Chairman of the House Committee on Banking and Currency, upon whose understanding of the Act the Department has heavily relied, summarized this purpose succinctly:[10]

> "The major purpose of this bill is to provide a single standard for the approval and adjudication of bank mergers prior to their consummation . . . Under the Bank Merger Act of 1960 the bank supervisory agencies approved bank mergers on the basis of one standard and the Justice Department was free to attack these same mergers under the Sherman and Clayton Antitrust Acts. The Supreme Court of the United States in the Philadelphia National Bank case in June of 1963 held that the Bank Merger Act of 1960 did not preclude the application of the antitrust laws to bank mergers. The banking agencies and the courts continued to act under distinct statutory authority. A majority of your committee felt that the law should provide a single standard to be applied by the agencies and the courts alike.
>
> "This is exactly what this bill does. The single standard that the bill establishes is found in paragraph 5(b) . . ." 112 Cong. Rec. (Daily ed.) 2333.

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[10] Many other congressmen can be cited on this point. See, *e.g.*, 112 Cong. Rec. (Daily ed.) 2333 (Congressman Smith, Va.); 112 Cong. Rec. (Daily ed.) 2336 (Congressman Multer); 112 Cong. Rec. (Daily ed.) 2337 (Congressman Brock); 112 Cong. Rec. (Daily ed.) 2339 (Congressman Ashley); 112 Cong. Rec. (Daily ed.) 2343 (Congressman Stanton); 112 Cong. Rec. (Daily ed.) 2355 (Congressman Grabowski). The sense of the Senate was the same. 112 Cong. Rec. (Daily ed.) 2538 (Senator Robertson); 112 Cong. Rec. (Daily ed.) 2545 (Senator Hart).

In view of the plain meaning of the statute, which is clearly reinforced by the legislative history, banks contemplating merger now should be able to do so with the assurance that their application will not be evaluated by one set of standards by the banking agencies and then attacked on the basis of another set of standards by the Department of Justice.

This paramount statutory purpose of requiring the banking agencies, the Department of Justice, and the courts to apply a single standard in evaluating bank mergers requires that the burden of pleading the anticompetitive effects of the proposed transaction are not clearly outweighed in the public interest be placed upon the Department. The Department's position — that it is entitled to evaluate a merger and file a lawsuit under section 7 of the Clayton Act without being required to plead that the anticompetitive effects of the transaction are not clearly outweighed in the public interest — would thwart the congressional purpose. Mergers which were manifestly legal under the Bank Merger Act of 1966 could be approved by administrative agencies on the ground that the anticompetitive effects of the transaction were clearly outweighed in the public interest and subsequently attacked by the Department of Justice on the basis of another standard.

This pleading question is peculiarly vital in an area where the mere institution of a suit, with the resultant automatic statutory stay, can in itself frustrate a proposed merger. See, *e.g., United States v. First Nat'l Bank of State College*, 5 Trade Reg. Rep. 52,622 Cas. No. 1900 (D. Pa. 1966). (Banks withdrew application for approval to merge after complaint was filed); Note, 79 Harv. L. Rev. 391, 393-94 (1965). In antitrust litigation under the Sherman and Clayton Acts, the government must swear to all of the necessary "specific facts" in order to obtain an ex parte re-

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straining order. Rule 65(b) Fed. R. Civ. P. Congress could not have intended that a plaintiff become entitled to an automatic injunction without even having the burden of alleging all the facts necessary to demonstrate a violation of the controlling statute.[11] The burden of pleading that the benefits of the transaction in the public interest do not clearly outweigh the anticompetitive effects gives the Department the duty of making the allegation in good faith, whether it has the burden of proof or not. Fed. R. Civ. P. 11; CLARK, CODE PLEADING § 41 at 253 (2d ed. 1947). This, of course, assures that the new statutory test would be honored by the Department in its administration of its duties under the statute as Congress intended.

III. The Statutory Stay Should Not Be Revived In The Event Of Remand Since The Evidence Adduced By Appellees Below Was Sufficient To Require Dissolution Of The Stay.

Appellee banks produced extensive evidence in the trial court in support of their motion for dissolution of the statutory stay. This evidence demonstrated both that the anticompetitive effects of the merger would not be significant-

[11] Under the Department's construction of the Act, it would be entitled to bring suits without even forming an opinion as to whether the benefits of the transaction in meeting the convenience and needs of the community to be served clearly outweigh its anticompetitive effects. Apparently, this is what it did in *Provident*. Many months after filing suit, the Department's only response to the Philadelphia banks' detailed outline of their claims on convenience and needs was the statement that it "is not in a position to inform this Court whether Plaintiff believes conclusions reached [in the Banks' pretrial brief] are correct or not." (Department's reply brief in *Provident*, ¶ 21). It took this position even though the trial court's Pre-trial Order No. 1 provided that any issues, contentions or claims not set forth in the pre-trial briefs are to be deemed "abandoned, uncontroverted, or withdrawn."

ly anticompetitive,[12] and that any anticompetitive effects would be clearly outweighed in the public interest by the probable benefits to the convenience and needs of the community from the transaction.[13] The Department's only response to these hundreds of pages of documentary evidence produced below was an affidavit showing alleged concentration figures. All of the banks' evidence on the benefits to the convenience and needs of the community and the bulk of the evidence produced on the competitive effects was unchallenged.

Even were the government to prevail in its position that the motion to dismiss was improperly granted, the trial court's grant of the motion to dissolve the statutory stay should nevertheless be sustained since appellees' evidence of the convenience and needs of the community was not challenged by appellant and provides a sufficient basis for dissolution of the statutory stay.

CONCLUSION

By adamantly standing on its pleadings, the Department has presented in No. 914 an appeal based solely on a narrow question of pleading. The plain meaning of the Act, the basic rules of pleading, and effectuation of the statutory purpose, as evidenced by the legislative history, require that the burden of pleading both elements of the statutory test be placed upon the Department. The questions of burden of proof and scope of review under the Bank Merger Act of 1966 are independent of the burden of pleading. Thus, even if the questions of burden of proof and scope of review were reached and were resolved in the Department's favor,

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[12] See especially, Defendants' Exhibit 2, Supplemental Memorandum to the Antitrust Division of the Department of Justice.

[13] See Defendants' Exhibit 1, Application to the Comptroller of the Currency for Approval to Merge.

they do not affect the propriety of the trial court's dismissal on the pleadings in No. 914.

The Department deliberately refused to amend its pleadings in this cause even though six district courts (one a three-judge court) had indicated that its pleading theories were erroneous. By bringing this case to this Court on the pleadings it has already delayed the trial of this cause by some four months. If this case is remanded, reinstatement of the statutory stay at this point would make it commercially infeasible for defendant banks to litigate the cause on the merits. We submit that if the trial court's dismissal on the pleadings is found to be correct by this Court there should be no remand. The Department deliberately chose to stand on its complaint after the trial court gave it an opportunity to amend. It should bear the consequences of that deliberate decision. The action of the trial court should be affirmed and this litigation terminated.

Respectfully submitted,

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APPENDIX

Excerpts From Transcript

"THE COURT: Well, the burden, I am not too much [concerned] about the burden of proof but as to what is actually necessary for you to allege, and that is what we are concerned about here.

"Isn't this a motion to dismiss beeause you don't state a cause of action?

"MR. TOOHEY: We don't state sufficient, in the words of the motion, facts —

"THE COURT: — upon which relief could be granted. Right?

"MR. TOOHEY: To support an action, a cause of action under the Bank Merger Act of 1966 or Section 2 of the Sherman Act. I think that is the language of the motion." (Last Hour of Proceedings, pp. 5-6)

* * *

"THE COURT: I recognize full well that this is very important and serious litigation. I go *(sic)* [have] no more desire than Judge Clary had to dispose of this on a matter of pleading. Normally, of course, we don't.

"Certainly as he points out the defendant knew full well what the Government was driving at when you filed this suit irrespective of the verbiage you used in your petition. By the same token isn't it true that you knew full well what you were saying and doing? You didn't omit this second step accidentially or inadvertantly —

"MR. TOOHEY: No." (Last Hour of Proceedings p. 12)

* * *

"THE COURT: You say that Section 7 applies. I suppose it can't be denied that it applies in some particulars, yes.

"What do you mean by that? What we are interested in here today is not whether Section 7 applies, but whether you have alleged a cause of action in your petition. Is that not true?

"MR. TOOHEY: Yes.

"THE COURT: What are the elements of your cause of action? You say to allege that the effect of the merger would be anticompetitive. Right?

"MR. TOOHEY: Yes.

"THE COURT: The defendants and the intervenor, as I understand it, such authority as there is, seems to say that it is necessary for you to allege, "A", that the effect would be anticompetitive and that ["B"] that it is not outweighed by the convenience and need. It seems to me as simple as that.

"I am not really interested in a definition as to what is or what is not an antitrust statute or whether you say categoricallly that Section 7 does or does not apply or other sections of the Clayton Act apply.

"I think it is just a question as to whether or not you have alleged a cause of action, or if you want to amend and undertake to do so, if you haven't already done it.

"Is that oversimplifying it, Mr. Toohey?

"MR. TOOHEY: Not at all, Your Honor." (Last Hour of Proceedings pp. 21-23)

* * *

"THE COURT: Anything else anybody wants to add?

(All answered in negative.).

"THE COURT: I am of the view in the light of these few authorities which we have at this time that the act of '66 made some rather substantial changes in the law. I understand the cases to hold the burden to be on the plaintiff to allege and prove an anticompetitive result of the merger, and further that that is not outweighed by the convenience and needs aspect of the matter.

"I think the Department of Justice has continued for reasons of its own to adopt a contrary interpretation which, of course, may or may not be accurate, these cases not having yet reached the appellate level, but I consider them as authoritative, at least at this time.

"I think that the petition fails to state a cause of action in that it alleges only the first step and not the second step which is necessary for the plaintiff to support.

"I have no desire to dispose of a case of this kind on a question of pleading. I think that was the view that influenced the other Judges that had the same matter before them when they spoke of notice pleading. That, however, isn't a case — well, this present case is one where all parties have acted with their eyes open. Both the plaintiff and the defendants have known precisely what they were doing. If they do not allege a case in their present petition, then Justice has done that because it desired to do so.

"I will sustain the motion to dismiss for failing to state a cause of action. I will give the government if it wishes an opportunity to amend and to allege a cause of action as I understand is required by the authorities to date.

"Let us say within ten days?"

United States District Court for the Southern District of Texas, Houston Division

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Civil Action No. 66-H-695. Filed December 7, 1966

UNITED STATES OF AMERICA, PLAINTIFF

v.

FIRST CITY NATIONAL BANK OF HOUSTON AND SOUTHERN NATIONAL BANK OF HOUSTON, DEFENDANTS, AND JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, INTERVENOR.

Judgment

The above cause came on to be heard on the 2nd day of December, 1966, on the Motion For Dissolution Of Statutory Stay of defendants, First City National Bank of Houston and Southern National Bank of Houston, and the Motion to Dismiss of Intervenor, James J. Saxon, Comptroller of the Currency, and came the plaintiff, defendants and intervenor by and through their respective attorneys of record and announced ready for the hearing on said Motions; thereupon, the Court, after hearing the pleadings, evidence and argument of counsel, is of the opinion and so finds that the Motion To Dismiss of the Intervenor should be granted with leave of the plaintiff to amend its complaint within ten (10) days and that as a result thereof, Defendants' Motion For Dissolution Of Statutory Stay should be granted.

It is, therefore, ORDERED that the Motion to Dismiss of Intervenor, James J. Saxon, Comptroller of the Currency be granted and this cause will be dismissed unless plaintiff shall amend his complaint within ten (10) days from the effective date hereof.

It is further ORDERED that the Motion for Dissolution of Statutory Stay of First City National Bank of Houston and Southern National Bank of Houston will be granted, effective on dismissal of the action.

It is further ORDERED that this judgment is and shall become effective at 12:00 o'clock Noon on December 9, 1966.

ENTERED on this 7th day of December, 1966.

(S) Ben C. Connally,

United States District Judge.

INDEX

CITATIONS

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 914

UNITED STATES OF AMERICA, *Appellant*

v.

FIRST CITY NATIONAL BANK OF HOUSTON, SOUTHERN NATIONAL BANK OF HOUSTON, AND WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

No. 972

UNITED STATES OF AMERICA, *Appellant*

v.

PROVIDENT NATIONAL BANK, CENTRAL-PENN NATIONAL BANK OF PHILADELPHIA, AND WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE COMPTROLLER OF THE CURRENCY

OPINIONS BELOW

The opinions of the district courts are not reported. The opinions of the court in *United States* v. *Provident National Bank, et al.* are attached hereto as Appendix H.

QUESTIONS PRESENTED

Although the questions presented by the Department of Justice in both *United States* v. *First City National Bank of Houston, et al.* (No. 914) and *United States* v. *Provident National Bank, et al.*, (No. 972) are identical, each case is in a different procedural posture and the issues raised in the lower courts differ. However, for the convenience of this Court a combined brief is submitted. These differences will receive further consideration during oral argument.

STATEMENT

No. 914

First City National Bank of Houston (hereinafter First City) and Southern National Bank of Houston (hereinafter Southern), pursuant to the Bank Merger Act of 1966, 12 U.S.C. § 1828(c) (hereinafter BMA-66), filed an application with the Comptroller of the Currency of the United States (hereinafter the Comptroller) for permission to merge. In accordance with BMA-66, the Comptroller considered the extensive evidence of First City and Southern in support of their application, requested and considered opinions of the Federal Reserve Board, the Federal Deposit Insurance Corporation and the Department of Justice, made findings and approved the merger on September 20, 1966.

The Department of Justice filed a complaint on October 19, 1966, in the federal district court alleging that this merger violated Section 7 of the Clayton Act.

The Comptroller intervened as a party in this action on October 26, 1966, and the same day moved to dismiss the complaint for failure to state a claim upon which relief can be granted. Defendant banks filed

a motion on November 1, 1966, for dissolution of the statutory stay. After a hearing was held on both motions on December 2, 1966, the district court ruled the motion of the intervenor to dismiss should be granted with leave of the plaintiff to amend its complaint within ten (10) days and also granted defendants' motion for dissolution of the statutory stay.

The Department of Justice declined to amend on December 19, 1966, and the court's order dismissing the complaint and dissolving the stay became effective. The district court entered a temporary injunction, effective until December 22, 1966, while the Department of Justice filed an application for a further stay with this Court. Said application was argued before Justice William J. Brennan, Jr., on December 28, 1966, and on January 16, 1967, this Court granted the requested stay and also noted probable jurisdiction.

No. 972

On December 6, 1965, Provident National Bank (hereinafter Provident) and Central-Penn National Bank, (hereinafter Central-Penn) pursuant to the Bank Merger Act of 1960, 12 U.S.C. § 1828(c), filed an application with the Comptroller for permission to merge. This was granted on March 4, 1966, under the standards of BMA-66. Following said standards of BMA-66, the Comptroller issued an opinion on March 31, 1966, explaining and justifying his decision under the standards of the new Bank Merger Act. This opinion was rendered after careful consideration of: extensive material submitted by the banks in support of the application to merge; opinions requested and received from the Federal Reserve Board and the Department of Justice, Antitrust Division; receipt of re-

ports of bank examiners who conducted detailed examinations of each of the banks; and, the reports of the Regional Comptroller of the Currency.

The Department of Justice filed suit on April 1, 1966, alleging a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, only. No reference was made at all to BMA-66. On April 10, 1966, the Comptroller intervened. On August 11, 1966, the Comptroller moved to dismiss the Complaint on the ground that plaintiff had failed to state a claim upon which relief could be granted. Defendant banks also filed a motion to dismiss on August 22, 1966.

After filing of briefs and argument the District Court ruled that it did not sustain the position of the Department of Justice that it was entitled to sue under the court's standards of Section 7 of the Clayton Act. However, under the court's concept of notice pleading, it needed only to take judicial notice of the relevant statute (BMA-66), and federal acts are a proper subject for judicial notice. Therefore, in effect, the court amended the Complaint to charge a violation of the standards of BMA-66, instead of the standards enunciated in Section 7 of the Clayton Act. The Court also stated, in its opinion, that it was not necessary at that time to reach the question of who had the burden of proof under BMA-66. It thereupon denied the motions to dismiss.

On November 4, 1966, following the receipt of briefs and argument, Judge Clary ruled on the burden of proof question holding that since plaintiff's only action lay within the ambit of BMA-66, the logic of that holding allows only one solution:

> Justice must prove a violation of BMA-66, Section 5(B). To show this violation, Justice has to

prima facie establish (1) that there are anticompetitive effects, as defined in Section 5(B) and (2) that these anticompetitive effects are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. Only such a showing will make out a case for violation of BMA-66. Proof of anticompetitive effects solely is no longer controlling. A merger may be anticompetitive and yet be legal because it promotes the public interest as set forth in the Act. Therefore, for Justice to show illegality, it must prove first that a merger is not only anticompetitive, but also prima facie that it is not in the public interest.

If and when Justice establishes such a prima facie violation of BMA-66, the burden of producing evidence will shift to the Banks and the Comptroller to counter the Justice Department's proof.

Once the Banks and the Comptroller have presented their case, Justice will be given an opportunity to rebut such matters as are raised by the Banks and the Comptroller in regard to the convenience and needs test. In any event, however, Justice has the overall burden of persuasion to show the illegality of the merger.

Subsequent to the Court's ruling on the burden of proof, plaintiff filed a summary of evidence and statement of position in which it refused to accept the burden placed on it of proving a violation of the standards set out in BMA-66.

After receipt of plaintiff's statement of position, motions for final judgment were made by defendant banks and the Comptroller. A hearing on said motions was held on December 12, 1966, and on December 29, 1966, Judge Clary handed down his opinion dismissing the

complaint with prejudice and ordered the stay to be lifted not earlier than January 18, 1967.

The Department of Justice filed an application for stay, pending this appeal, which was granted by Mr. Justice Brennan on January 16, 1967.

In each of these cases, Justice was given an opportunity to amend its pleading and in each instance it rejected the offer. A similar opportunity was given to Justice by Chief Judge Harper in the case of *United States* v. *Mercantile Trust Co.*[1] upon his dismissal of that suit upon substantially the same grounds. It was also rejected.

SUMMARY OF ARGUMENT

While BMA-66 provides that the validity of any proposed merger attacked by the Department of Justice after approval by the bank regulatory agency is to be tested by the Court under "the substantive rule of law set forth in . . . this Act,"[2] i.e., "the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5)",[3] which reads:

(5) The responsible agency shall not approve—

(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anti-

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[1] *United States* v. *Mercantile Trust Company, et al.* (E.D. Mo., Dec. 19, 1966). See Appendix G.

[2] 12 U.S.C. 1828(c), Sec. 2(c), as amended. The text of this statute (Bank Merger Act of 1966) is recited in Appendix D.

[3] *Id.*, Paragraph 7(B).

> competitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.[4]

and although Congress intended that the Act "would establish a single set of standards for the consideration of future mergers by the banking supervisory agencies, the Department of Justice and the courts",[5] the position taken by the Antitrust Division was that:

> Section 7 of the Clayton Act is still applicable to bank mergers; it has not been replaced or repealed by the Bank Merger Act of 1966, and plaintiff is not required to plead or prove a violation of the Bank Merger Act.[6]

Thus Justice concedes no "substantive rule of law" to BMA-66. Rather it urges that BMA-66 is a legislative recognition of the broader banking horizons of the failing company doctrine which this Court acknowledged in *Philadelphia National Bank.*[7] Since the failing company doctrine is a matter of defense, it reasons that convenience and needs is therefore a defensive matter.

The initial question for resolution on this appeal is whether and what case the Department of Justice must

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[4] *Id.* (5).

[5] House Committee Report accompanying H.R. 12173 (BMA-66) 89th Congress, 2nd Session, Rpt. #1221, p. 1 (1/24/66).

[6] Page 7, brief in opposition to the motion to dismiss in *Houston.*

[7] *United States* v. *Philadelphia National Bank, et al.*, 374 U.S. 321, 372.

plead and prove[8] under BMA-66. But in order that it may fairly assess the scope of this responsibility, Justice must be apprised of the nature and character of a putative court's "review *de novo*" of a decision of the responsible bank regulatory agency.

The courts below have been unanimous that Justice is required to plead and prove a violation of the substantive standards of BMA-66.[9] All who have considered the question have restricted the judicial function in reviewing the decision of the responsible bank supervisory agency to a traditional review of the findings of a regulatory agency. The three-judge court in *Crocker* (*supra*) felt that the judicial function was to determine whether the decision of the regulatory agency was supported by substantial evidence, and in this it was confirmed by the opinion of Chief Judge Miller in *Nashville* (*supra*). Chief Judge Clary, in *Provident*, agreed with this position in cases where the agency had held a hearing. Lacking such a hearing, he felt that the judicial function was to inquire into the facts to determine whether the agency's decision was

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[8] To suggest that the only question that need be resolved now is whether Justice must *plead* a violation of BMA-66—reserving the question of the burden of proof—would render the entire appeal sterile and an exercise in formal pleading. All of the rest of the issues would remain unresolved in this and in the companion cases.

[9] *United States* v. *Crocker-Anglo National Bank*, 1966 Trade Reg. Rep. Par. 71898 (D.C. Cal.), Appendix E to this memorandum; *United States* v. *First National Bank of Hawaii*, Civ. No. 2540, D. Hawaii, 1966 (Oral Opinion of October 31, 1966, Transcript pp. 91-94; *United States* v. *Mercantile Trust Company* (E.D. Mo., Dec. 19, 1966), Appendix G to this memorandum; *United States* v. *Provident National Bank*, 1966 Trade Reg. Rep. Par. 71931 (E.D. Pa.), Appendix H to this memorandum; and *United States* v. *Third National Bank of Nashville*, 1966 Trade Reg. Rep. Par. 71934 (M.D. Tenn.), Appendix F to this memorandum.

fairly within its discretion. In that event he would consider the decision binding—absent evidence that the discretion had been arbitrarily or capriciously abused. This opinion adopted as precedent a recent decision of the Fourth Circuit in a branching case.[10]

We think the positions taken below are sound. Thus, we believe that this Court should confirm the general agreement of the lower courts and resolve the slight anomaly regarding the form of judicial review.

The position taken by the Department of Justice plainly indicates an expectation that these cases will comprise an "instant replay" of this Court's decision in the *Philadelphia Bank* case, where it ruled that the Bank Merger Act of 1960 did not repeal by implication the antitrust laws. In that case, this Court pointed out certain procedural difficulties which it apparently felt would have raised questions of due process had that interpretation been adopted.[11] But those procedural difficulties have been largely resolved by the different terms of this statute. The bank regulatory agencies are charged with the application of specific antitrust concepts in a quantified context. The statute specifically provides that the courts are to review and the decision is based upon findings made and published upon a substantial record to which the Department of Justice is made privy. Under these circumstances, this Court has postulated a limited judicial role as a standard.[12]

By this statute, the Congress has expressed its will that the bank regulatory agencies, in the first instance,

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[10] *First National Bank of Smithfield, North Carolina v. Saxon*, 352 F. 2d 267 (October 21, 1965).

[11] See discussion of this point at pp. 29-32, *infra*.

[12] *Atlantic Refining Co. v. FTC* (1965), 381 U.S. 357.

are to balance antitrust and banking factors in weighing the desirability of a merger. Unless Justice is to argue—as it has not—that the bank supervisory agencies are incapable of fairly evaluating these competitive factors (as they apply in banking), then bringing these cases under Clayton 7 is nothing more than an attempt to substitute the judgment of that Department for that of the bank regulatory agencies. We submit that the statutory scheme of BMA-66 accords with the procedural requirements set down by this court in *Philadelphia Bank* and, therefore, comes squarely under the rule of *Atlantic Refining, supra.*

> Where the Congress has provided that an administrative agency initially apply a broad statutory term to a particular situation, our function is limited to determining whether the Commission's decision "has 'warrant in the record' and a reasonable basis in law."[13]

ARGUMENT

I. LEGISLATIVE HISTORY

THE BANK MERGER ACT OF 1966 WAS SPONSORED AND ENACTED DESPITE THE OPPOSITION OF THE CHAIRMAN OF THE HOUSE BANKING AND CURRENCY COMMITTEE AND THE SEVERAL REPRESENTATIVES WHO ARE USED AS THE SOLE AUTHORITIES IN SUPPORT OF JUSTICE'S INTERPRETATION OF THE STATUTE.

In interpreting the meaning of BMA-66 in these cases, appellant has urged the Courts to listen only to the words of Representative Patman, characterized as one of "the Congressmen primarily responsible for the bill,"[14] Representative Reuss, "one of the principal

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[13] *Id.* at p. 367.

[14] Jurisdictional Statement, p. 10, Fn. 5.

framers of the . . . Act"[15] and, strangely, to the advice of those few legislators who opposed the bill to the bitter end.

On the other hand, Circuit Judge Pope, speaking for the three-judge court in *Crocker*, rejected these "authorities":

> Counsel have largely confined their quotations to those from Congressmen Weltner and Todd, who opposed the bill, and from Congressman Patman who bitterly fought the legislation and finally, through a face-saving compromise, introduced the bill, while stating that if he alone were writing the bill, he "would be against it as a matter of principle." (Cong. Rec. Feb. 8, 1966, p. 2357). Counsel's choice of makers of remarks is not very persuasive.[16]

An examination of the legislative history sustains the position taken by the Court in *Crocker*. Indeed, the proposition that Congressmen Patman and Reuss are in any way responsible for the enactment of the legislation or participated in any substantial way in its drafting so far transcends the implausible as to merit the characterization of fanciful.

The initial bill, S. 1698, was introduced by Senator Robertson on April 5, 1965. It would have made the bank regulatory agencies sole arbiters of the properiety of any bank merger, and would have immunized any merger consummated before May 13, 1960. S. 1698 was amended (by motion of Senator Proxmire) on

[15] *Id.* "One of the bill's principal draftsmen", brief p. 23; "who drafted many of the Act's key provisions", *id.*, p. 35 "who drafted this part of the Act", *id.*, p. 49.

[16] Slip Opinion, p. 9.

June 8, 1965, to require submission of proposed mergers to Justice. That agency was instructed to institute suit under the Sherman or Clayton Act within thirty days of receipt of notice or be barred from future prosecution under *any* antitrust law. An injunction would automatically attach, removable only after termination of suit. The immunization of prior mergers was advanced to encompass all those which preceded the prospective date of enactment of the legislation.

As amended, the bill passed the Senate by voice vote on June 11, 1965. On June 14, the bill was referred to the House Committee on Banking and Currency. The Chairman, Representative Patman, referred it to the Subcommittee on Domestic Finance, where it remained quiescent until it was resurrected on July 19 by a letter from 26 of the 33 full committee members demanding that hearings be held. Thereafter, the subcommittee held occasional hearings into the early fall. In the interim, Congressman Ashley, who had taken the lead in pushing the proposal through the committee, had on September 13, 1965, introduced H.R. 11011.

H.R. 11011 proposed that the regulatory agencies should hold full-scale, formal hearings on each merger application. Should Justice object to a given approved merger, the decision of the supervisory agency could be reviewed by a court of appeals—a plan patterned on the practice of—inter alia—the Federal Trade Commission. In commenting on this proposal in his letter of September 24, 1965, to Chairman Patman, the Attorney General observed:

> I am opposed to particular procedures set forth in H.R. 11011. The bill provides for review in a court of appeals on the basis of a "record" upon

which the order complained of was entered, and further provides that on review the findings of the agency as to the facts, if supported by substantial evidence, shall be conclusive. This type of review is normally used for determinations by such agencies as the Federal Power Commission and the Federal Trade Commsision who, pursuant to the Administrative Procedure Act, have held full public adversary hearings on a public record, with full opportunities to all parties to develop evidence as to rebut evidence produced by the others. No such procedures for the full development of a record are provided for by the Bank Merger Act or by any current proposal, and indeed there are important considerations that make the more summary handling of merger applications particularly appropriate. *Since the vast majority of applications raise no serious problems of an antitrust nature, there would seem to be little point in subjecting all merger applications before the regulatory authorities to all of the requirements of the Administrative Procedure Act in order to lay the groundwork for court review in those few instances where serious questions of competition are presented.*

Consequently, while I am sympathetic to efforts to clarify through legislation the application of antitrust law to banks, I believe that the current practice, whereby the Department of Justice institutes proceedings in Federal district courts against mergers which it believes to be unlawful, should be allowed to continue; so that there could be a trial de novo of all issues in any such suit.

In summary, I am not opposed to legislation which would clarify the application of antitrust law to banks and am sympathetic to provisions which would remove some of the fears presently held by the banking industry with respect to retroactive application of section 1 of the Sherman Act

> or section 7 of the Clayton Act. Nor would the Department be opposed to explicitly providing that the factors taken into account by the banking agencies under the Bank Merger Act of 1960 would also be taken into account by the courts—the proposition which underlies H.R. 11011. We believe all such factors should be taken into account in determining whether the merger is desired to be in the public interest. We believe it important to keep in mind that both regulation and competition have a role to play in seeing to it that banking institutions serve the high and especial public interest for which they are designed.[17] (Emphasis Supplied)

The last two quoted paragraphs represented an important change in position by the Attorney General, who had previously expressed his total objection to any bank merger legislation. Although communication of this letter to the Committee was delayed, its existence and contents became known. Further parliamentary maneuvers by Representative Patman occasioned a blistering letter from Representative Ashley to the Chairman alleging them to have the effect of frustrating Committee action. The letter, dated 10/15/65, concluded:

> This is the sorry story, step by step, that has made a mockery of sincere efforts to develop responsible legislation relative to bank mergers. Since the Senate bill was referred to your Committee on June 11, a majority of the Committee has been obliged to insist upon each and every legislative step that has been taken. From the time you acceded to the letter of September 29, signed by

[17] Letter, Attorney General Katzenbach to Rep. Patman, 9/24/65, as reproduced in the House Report accompanying BMA-66.

> 19 members, requesting a special meeting for the purpose of acting upon S. 1698 as amended, you have permitted exactly 3 sessions to take place for this purpose. Time after time parliamentary procedure has been flaunted, the wishes of a majority of the committee thwarted, and every dilatory and obstructionist tactic at your command resorted to in your efforts to prevent the Committee from exercising its will on bank merger legislation prior to the adjournment of Congress.[18]

As the italicized portions of the Katzenbach letter indicate, the heart of his objection to full scale hearings on every application was his contention that "a more summary handling of merger applications" at the agencies would be more economical. Representative Ashley, with the help of Representative Ottinger, then reworked H.R. 11011 to include a recognition of this and other objections which had been raised by interested parties.

The Committee majority was still unable to obtain a call by the Chairman for a meeting to conclude action on the various proposals. Backed by a majority of the Committee, Representative Ashley arranged for a Committee session on October 19 to which the Chairman was not invited. When members of the Committee staff learned of the meeting in progress "in the darkened chamber" they notified Representative Patman who was not present at the time, but who ordered the meeting disbanded. The dissidents remained. Representative Reuss then entered the Committee room and attempted to rule the session out of order as not in accord with the Chairman's instructions. The dissi-

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[18] This letter is attached as exhibit A to this memorandum.

dents overruled the motion and voted out the Ashley bill 17-1.[19]

A distinct majority of the Committee had reported out a bill in defiance of the Chairman. While questions might be raised about the legality of their conduct, quite plainly the majority of the Committee was in full revolt with a bill before the whole House. To raise questions regarding the legality of the session at which the bill was voted out would throw open for public view the whole struggle. Besides, the majority of the House might side with the majority of the Committee. It would appear that the opposition forces decided that discretion was the better part of valor.

Accordingly, on the next day, Representative Reuss proposed a substitute measure in a letter to the Department of Justice.[20] As to the critical Section 5 he noted:

> 2. The Reuss proposal (in other sections identical with the Ashley-Ottinger proposal):
>
> "The responsible agency shall not approve any proposed merger transaction—
>
> "(A) unless it finds that such transaction would not involve a violation of section 2 of the Sherman Antitrust Act (15 U.S.C. 2).

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[19] Representative Patman's position on the legality of the Committee's action is contained in a press release including a staff report of the incident. This is enclosed as Appendix B. Representative Ashley's version is contained in the Congressional Record for October 22. This is enclosed as Appendix C.

[20] Letter, Representative Reuss to Attorney General Katzenbach, 10/20/65, as reproduced in the House Report accompanying BMA-66. Fn. 5, supra.

"(B) which would violate section 1 of the Sherman Antitrust Act (15 U.S.C. 1) or section 7 of the Clayton Act (15 U.S.C. 18) unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed by the probable effect of the transaction in meeting the convenience and needs of the community to be served."

The Attorney General's reply of January 5 stated: "confirming oral discussion between you and my staff. . . . Your letter and your subsequent assistance were very helpful to us in our further consideration." The Attorney General then proposed a redraft of Sections 5 and 7 of the Ashley Bill.[21] Representative Reuss wrote Representative Patman on the following day "I intend, therefore, to urge its [Justice's proposal] adoption as a substitute for sections 5 and 7 of the Ashley-Ottinger bill, retaining the other portions of the Ashley-Ottinger bill."

Nor was this the end of the efforts of Representatives Patman and Reuss to stop passage of a bill. At the final sessions of the Committee, Representative Patman accepted 7 separate motions to adjourn, the net effect of which would have been to preclude any bank merger legislation from floor consideration. On each of these votes he was joined by Representative Reuss.

In summary then, on the question of the roles which were played by various members of the Congress, we see that it was not until after a majority of the House Banking and Currency Committee, in an allegedly "rump" session, had voted to approve an Ashley bill and this action had been indirectly confirmed by the entire committee in parliamentary maneuvering, that

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[21] As reproduced in the House Report accompanying BMA-66.

Representative Patman agreed to let *any* bill come out of the Committee. In submitting the bill which bears his name and which became the Bank Merger Act of 1966, he reported to the Congress:

> Mr. Chairman, if I alone were writing this legislation and proposing it, I certainly would not propose it as it is before us. I would be against it as a matter of principle.[22]

We think it would reflect no discredit upon Representative Patman if the Court, recognizing the limitations of human nature, were to view his interpretations of this statute with a jaundiced eye. He opposed the bill, "in principle" and with all his legendary vigor. What would be more natural than for him to attempt to shave its impact as much as possible when it reached the floor of the House?

Representative Reuss lent considerable assistance to Representative Patman, and when a bill of some sort became inevitable, he worked closely with the Department of Justice to modify the language of Congressman Ashley's bill. The principal proposed changes were not adopted. In large part in *haec verba,* and entirely in purport, the bill enacted was the Ashley Bill. Accordingly, we suggest that Mr. Reuss' comments on a bill he opposed in the first instance, and up to the day of final committee action, and with whose ultimate antagonists (Justice) he had allied himself, must be view in proper context.

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[22] Cong. Rec., 2/8/66, p. 2357. Compare with the statement of Senator Robertson when he introduced the bill in the Senate: This is a good bill. I do not believe it is a perfect bill, but I am convinced it is workable and satisfactory . . . Cong. Rec. 2/9/66, p. 2538.

On the other hand, Senators Robertson and Proxmire had sponsored the legislation in the Senate as had Representative Ashley[23] in the House. When the House passed the amended bill, Senator Robertson quickly sponsored the House version before the Senate Banking Committee where is was approved by a 9 to 2 vote.

Since the final bill was eminently satisfactory to its original sponsors and so distasteful to Representative Patman, is it not to the "winners" that we should turn for an evaluation of the meaning of the statute?

A physical comparison of the Ashley-Ottinger bill voted out by the Committee on October 19, 1965, and the bill ultimately enacted demonstrate the origins of the ultimate bill. They are reproduced side by side as Appendix D to this brief.

It will be noted that the entire text of Ashley-Ottinger is preserved. Of the three additions to the text found in the enacted bill, one, 7(D), permitting agency intervention, was added by the Committee as a counter to the automatic injunction. It was not contained among Representative Reuss' proposals. The second, Section 3, was added by the Committee—again not among Representative Reuss' proposals—to em-

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[23] In submitting H.R. 12173 to the Senate, Senator Robertson acknowledged the large role played by Representative Ashley in securing passage:

> "I want to pay a special tribute to Congressman Ashley of Ohio for his work in connection with this bill. His untiring and constructive efforts have brought about virtual unanimity in the . . . House." (C.R., 2/9/66, p. 2551).

Congressman Grabowski, in the course of the debate noted: "I am proud to have been associated with my colleagues (naming Moorhead, Ashley, and Ottinger) in helping to draft this legislation." (C.R., 2/8/66, p. 2355).

phasize that even the parties to the *Philadelphia Bank* merger might reinstate their application under the new standards. The third, Representative Reuss' sole contribution to the bill, is the last sentence of paragraph 7(A). "In any such action, the court shall review *de novo* the issues presented." This sentence was proposed to him on January 5, 1966, by the Department of Justice which had in turn distilled the proposal from the conferences between the interested agencies which had taken place between the request by Representative Reuss of October 20, 1965, and a report from Secretary Fowler setting out the results of those conferences on January 3, 1966.[24] The heart of Representative Reuss' proposal of January 5, 1966—his last—was a rewrite of the key section 5 which would have returned the Act to about the same position as the Bank Merger Act of 1960 after the *Philadelphia Bank* decision, i.e.

> Subsection (5) to read as follows: "The responsible agency shall not approve a proposed merger transaction unless it finds that such transaction will be in the public interest, taking into consideration the effect of the transaction on competition (including any tendency toward monopoly) and the importance of protecting the public against bank insolvency. In determining the effect on competition and the likelihood of insolvency, the agency shall take into account the following factors, among others:
>
> (A) the financial history and condition of each of the banks involved,
>
> (B) the adequacy of their capital structure,
>
> (C) their future earnings prospects,
>
> (D) the general character of their management, and

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[24] See House Committee Report, *supra*.

(E) the convenience and needs of the communities to be served."

This key proposal was rejected. The practical identity of Ashley-Ottinger and the enacted bill is apparent when we note that the purposes section of the Committee Report on Ashley-Ottinger was adopted intact as the purposes section of the Committee Report on the enacted bill.[25] To sum up this legislative history,

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[25] Purpose of the Bill

The purpose of the bill is to resolve the apparent conflict between the antitrust laws and the Bank Merger Act of 1960. The bill would furnish guidelines for the equitable disposition of certain cases now before the courts and it would provide an orderly procedure for the litigation of such bank mergers as the Department of Justice may desire to contest in the future.

(1) The bill would establish a single set of standards for the consideration of future mergers by the banking supervisory agencies, the Department of Justice and the courts under the antitrust laws—standards stricter than those in the Bank Merger Act, but which include both the effect of the merger on competition and the convenience and needs of the community to be served; it would postpone consummation of mergers hereafter approved for 30 days to give the Department of Justice an opportunity to enjoin them; and it would exempt mergers approved under the new standards and procedures from all provisions of the antitrust laws except the antimonopoly provisions of section 2 of the Sherman Act.

(2) It would exempt from all provisions of the antitrust laws except section 2 of the Sherman Act, mergers consummated before June 17, 1963, including the three "pre-Philadelphia" mergers now in court.

(3) It would exempt from all provisions of the antitrust laws except section 2 of the Sherman Act, mergers consummated after June 16, 1963, and before enactment of the bill, except mergers against which antitrust suits had been brought before such enactment.

(4) It would require the courts to use the new standards of the bill in all cases instituted under the antitrust laws after June 16, 1963, and before enactment, including the three "post-Philadelphia" cases now pending in court.

the bill enacted was the Ashley-Ottinger bill which Representative Patman and Reuss had opposed from start to finish. Representative Reuss' sole contribution to the bill, the single sentence "In any such action, the court shall review de novo the issues presented" originated neither with him, nor with the Department of Justice which now lays claim to it. The Department of Justice's proposal for a "trial de novo," "the current practice," had been rejected by the committee. The sentence ultimately selected was a distillation from a series of meetings held by a number of interested agencies. Its meaning is discussed elsewhere in the brief. (pp. 33-48)

II. THE BANK MERGER ACT OF 1966 EFFECTED SUBSTANTIVE CHANGES IN THE LAW GOVERNING BANK MERGERS

THE INTENT OF THE SUPPORTERS OF THE BANK MERGER ACT OF 1966 WAS TO PLACE PRIMARY RESPONSIBILITY FOR THE DETERMINATION OF THE VALIDITY OF A BANK MERGER UPON THE RESPONSIBLE BANK REGULATORY AGENCY, AND CREATED A NEW SUBSTANTIVE RULE OF LAW TO BE APPLIED IN TESTING THE LEGALITY OF SUCH MERGERS.

In *Philadelphia Bank, supra,* this Court ruled that BMA-60[26] was a regulatory statute which did not "repeal by implication" the substantive terms of the Clayton Act.[27] Justice argues that the same is true of BMA-66, and it was therefore justified in suing under the Clayton Act. In effect, it contends that BMA-66 did not change existing law.

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[26] P.L. 86-463, 74 Stat. 129.

[27] *Supra*, p. 350.

Even assuming that this argument had any weight—which we deny, and which we shall disprove—we do not believe that that argument may now be raised by that agency. In a letter addressed to Representative Reuss on January 5, 1966, Attorney General Katzenbach stated his opposition to that portion of the Ashley-Ottinger bill which provided that:

> a merger transaction which tends to lessen competition may be approved where the probable adverse competitive effect thereof is clearly outweighed in the public interest by the probable effect of such transaction in meeting the convenience and needs of the community to be served.

His letter then continued:

> In thus permitting the single factor of "convenience and needs" to override all other considerations,[28] the proposal goes far beyond the desirable objective of achieving uniformity . . . and does not accord with my view that a substantive change in existing law is neither necessary nor appropriate.[29]

The enacted bill reads in appropriate part:

> (5) The responsible agency shall not approve—
>
> * * * *
>
> B. Any . . . merger . . . whose effect may be substantially to lessen competition . . . or which in any other manner would be in restraint of trade unless it finds that the anticompetitive effects . . . are clearly outweighed in the public interest by the probable effect of the transaction in meeting the

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[28] Compare this representation of the Attorney General with his current claim that the competitive factors predominate. (Brief, pp. 20-24)

[29] As reported in House Committee Report #1221, *supra.*

convenience and needs of the community to be served.

In attempting to influence the Committee considering proposed legislation, the Attorney General advised the Committee that language having the identical effect to that which was finally enacted would effect a substantive change. Now his office, through its attorneys, attempts to persuade the courts that this formal representation of his Department was without substance. We think they should not be permitted to treat their representations to the other branches of Government so cavalierly.[30]

On its own "merits", the argument fares no better. We must first assume that the Congress engaged in heated debate for months to no purpose, in violation of logic and canons of statutory construction. We must assume that the bill's bitterest critic, Representative Patman, was "opposed in principle" to a bill without force or effect. We must assume that the plain words of the statute do not mean what they seem to say. And finally, we must assume that the flood of congressional representations during the debates that the bill *was* designed to change operative law evidenced a massive congressional delusion on what it was doing.

In introducing the legislative question, Representative Smith (Va.) said:

> It boils down largely to a question of the Department of Justice, under the act, being required

[30] This initial representation by Justice was placed before the House while it was sitting as a Committee of the Whole considering the bill ultimately enacted. Representative Ryan quoted the above-cited portions of the Attorney General's letter and affirmed that "the bill is marred by the deficits to which the Attorney General referred." (Cong. Rec., 2/8/66, p. 2349).

to use these standards where the main consideration is the convenience and the necessity of the community. The only authority that would be left to fix standards by the Department of Justice would be the monopoly provision of the Sherman Antitrust Act.

I would hope that the bill would pass in its present form, and that we let it go to the Senate where, I am informed, the Banking and Currency Committe of the Senate will probable accept it as it is.[31]

Representative Smith (Calif.)

H. R. 12173 will:

. . . Establish a standard [which will] add to the traditional standard of a lessening of competition [a] concept of convenience and needs of the community served.[32]

Representative Widnall (N.J.)

H. R. 12173 states the conditions under which the banking agencies may approve a merger that is opposed by the Department of Justice. Furthermore the bill gives the courts clear guidelines for weighing banking factors against competitive factors.

There are very good reasons for giving the banking agencies more of a say in merger cases than is accorded some other businessses . . . strict application of the antitrust laws [in banking] can . . . sometimes . . . have a detrimental effect on a community[33] [Emphasis supplied.]

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[31] Cong. Rec., 2/8/66, p. 2332.

[32] *Id.*, p. 2333.

[33] *Id.*, p. 2335.

Representative Brock

> Congress, in passing the Bank Merger Act of 1960, attempted to make its views clear that bank mergers should be weighed in terms of both banking factors and competitive factors. . . . However, the Supreme Court . . . limited its consideration to one factor alone . . . competition.
>
> For those [mergers] consummated subsequent to the Philadelphia case, we simply provide that they shall be adjudged using the clarified standards of this bill.[34]

Representative Ashley

> The bill would require the court to use the new standards of the bill in all . . . "post-Philadelphia" cases. . . .
>
> The Courts have repeatedly held that under the antitrust laws, the social or economic benefits of a given merger cannot even be considered. In the Philadelphia case, the Supreme Court said: [quoting the "ultimate reckoning" language]
>
> It is a primary purpose of the bill to assure that the courts will never again dismiss as irrelevant the question of the needs of a community . . . [T]he merger must be shown to be sufficiently beneficial in meeting the convenience and needs of the community to be served that, *on balance,* it may properly be regarded as in the public interest. (Emphasis supplied.)[35]

Representative Moorhead

> In H. R. 12173 we are merely saying that first the banking authorities, and then the Attorney General, and finally the courts may approve a bank

[34] *Id.*, p. 2337.

[35] *Id.*, p. 2339.

merger "despite the foreseeable injury to competition" if "the merger would be consistent with the public interest" [quoting from Seaboard Air Line R. Co. v. United States, 34 L. W. 3181][86]

Representative Celler

While I am not particularly married to the idea and I do not like a weakening of the antitrust laws . . . I shall . . . vote for the bill. . . .[87]

Representative Stephens

banks should be under the antitrust laws and the competition factors only if they are weighed in the light of considerations that are peculiar to banks. . . .[88]

Representative Stanton

it was the expressed purpose and intent of Congress when it passed the Bank Merger Act in 1960 to make certain that control of bank mergers should be in the hands of the appropriate banking supervisory agencies, and that while the competitive effects of a proposed merger should be considered, they were not to be given a predominant position.

These standards were repudiated by the Supreme Court in the Philadelphia National Bank and the Lexington Bank cases in which the Court decided that the Justice Department had the final say in bank mergers. Contrary to the intent of Congress, the bank regulatory authorities were relegated to advising roles.

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[86] *Id.*, p. 2341.

[87] *Id.*, p. 2341.

[88] *Id.*, p. 2343.

These provisions . . . reinstate a measure of antitrust consideration which was lacking in the Senate bill, and they provide a banking standard that may allow economic assistance to a community even though a merger tends to lessen competition in that community. It is this statutory balance that was intended in 1960. . . .

* * * *

The . . . bill . . . directs the courts to apply the banking standards as well as the competitive standards in any judicial proceeding attacking an approved merger transaction . . . it . . . gives these standards equal weight as between economic and competitive circumstances and it assures this equilibrium through the entire review procedure.[39]

The same theme was emphasized in the Senate the following day.

Senator Proxmire

Subsection 5(b) was designed to change the law as it now stands, to allow the convenience and needs of the community to outweigh any anticompetitive effects that the merger might have.

Thus, it is a new standard. It is a clearly different standard that would apply in the case of banks.[40]

Senator McIntyre

This bill will reassert the power of the Congress to set down the rules for bank mergers, and will correct what I consider to be errors which the courts have made.[41]

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[39] *Id.*, p. 2343.

[40] Cong. Rec., 2/9/66, p. 2548.

[41] *Id.*, p. 2549.

Senator Hart [Chairman of the Subcommittee on Antitrust of the Judiciary Committee]

> the effect of the amendment added to the bill by the House is to amend the antitrust laws by providing special treatment for the banking industry. Under the House bill the banking industry will be less subject to the antitrust laws than any other segment of our economy.[42]

Congressman Ryan was only stating the obvious when he noted in the course of the debates:

> It is no secret that H.R. 12173 is before the House because of dissatisfaction with the Supreme Court's decision in Philadelphia. . . .[43]

Open the record of the hearings, the reports of the committees and the debates on enactment to virtually any page and you will find *Philadelphia Bank* hotly debated.

Were this not enough, *Philadelphia Bank* itself stipulated the conditions—met here—which would have occasioned a different result.

There the Court noted that:

> [While the Civil Aeronautics Board and the Federal Power Commission have] broad regulatory and remedial powers, in contrast, the banking

[42] *Id.*, p. 2544.

[43] Cong. Rec., 2/8/66, p. 2348. Rep. Fino ". . . today's situation stems from the Supreme Court's misinterpretation of the language we are about to replace." *Id.*, p. 2339. Sen Robertson "It is not often that the Congress finds it necessary or desirable to reverse a decision of the Supreme Court. It is necessary and desirable in this instance. . . ." P. 2542. See also the quotes from Sen. McIntyre and Reps. Stanton, Brock and Ashley at pp. 26-8, *supra*.

> agencies have authority neither to enforce the antitrust laws against mergers . . . . Although the Comptroller was required to consider effect upon competition in passing upon appellees' merger application, he was not required to give this factor any particular weight; he was not even required to (and did not) hold a hearing before approving the application; and there is no specific provision for judicial review of his decision. Plainly, the range and scope of administrative powers under the Bank Merger Act [of 1960] bear little resemblance to those involved in Pan American.[44]

But under the Bank Merger Act of 1966, the banking agencies *do* have specific responsibility to enforce the bank antitrust statute, the Comptroller *is* required to give specific weight to the competitive factor and finally there *is* specific provision for judicial review. In short, the procedural problems which this Court found present under BMA-60 have been cured in this new statute.

If in *Philadelphia Bank* the Court could say

> Thus, this is not a case in which our "earlier decisions are part of the arch on which the new structure rests, [and] we [must] refrain from disturbing them lest we change the design that Congress fashioned.[45]

it cannot now so say.

Nor does the legislative history of this act as recited herein permit a reiteration of the claim that

> It is settled law that "[i]mmunity from the antitrust laws is not lightly implied" . . . This canon

[44] *Supra,* at p. 351.

[45] *Supra* at p. 349.

of construction . . . is controlling here. For there is no indication in the legislative history to the 1950 amendment of Section 7 that Congress wished to confer a special dispensation upon the banking industry. . . .[46]

That the administrative decision to be reviewed was not preceded by a hearing is not determinative of the question of the weight to be accorded that decision.[47] Title 5, Section 1009 speaks of agency action not of agency hearings. It makes appealable any "final agency action for which there is no other adequate remedy in any court." That statement encompasses a merger application approved by a bank regulatory agency, since BMA-66 recites that a "merger transaction . . . [consummated] . . . in compliance with this subsection . . . may not thereafter be attacked in any judicial proceeding . . . [as] a violation of any antitrust laws" (except Sherman 2). Unless it sought review under BMA-66, Justice would be precluded from raising ordinary antitrust issues. The order would then make it an aggrieved party, otherwise finally judged. Thus, in *Zucker* v. *Baer,* D.C.N.Y. 1965, 247 F. Supp. 790, when an employee of the Veterans Administration brought an action to review and set aside the decision

[46] *Ibid.* 348.

[47] The question of administrative due process is not present in these cases since neither applicants, Justice, nor any other person has ever requested that the Comptroller hold a formal hearing. Should this Court, however, determine that lack of a hearing on these merger applications offends its concept of due process, it could remand these cases to this Office. (*U.S.* v. *Bianchi & Co.,* 373 U.S. 709, 718) We urge, however, that, in light of the limited occasions upon which the hearing will serve any purpose and our offer to hold hearings whenever sought by an "aggrieved party", the substantial record already developed in these applications (*supra*) accommodates the requirements of due process.

of the Regional Director of the Civil Service Commission in refusing reclassification, there was found to have been neither hearing nor even an administrative record in the usual sense of that term.

> [T]he court is thus left with no way of knowing what investigation the Director made or what evidence he considered except to the extent that this is reflected in his decision. [P. 792.]
>
> * * * * *
>
> If plaintiff submitted relevant and persuasive evidence, as he claims he did, and this evidence was ignored by the director, as plaintiff claims it was, the director's decision might well be thought to have been arbitrary. . . . In my opinion plaintiff has raised a question of fact which should be decided only after a trial or hearing, at which testimony can be taken as to the procedure followed by the Director, as to what evidence was before him, and as to what consideration he gave to it. This is not to suggest that the court should try de novo the merits of plaintiff's claim. . . . [P. 793.]

A. MEANING AND SCOPE OF REVIEW DE NOVO

THE RECORD IS CLEAR THAT THE PHRASE "REVIEW DE NOVO" WAS SUBSTITUTED FOR THE JUSTICE DEPARTMENT'S PROPOSAL FOR A "TRIAL DE NOVO". JUDICIAL INTERPRETATIONS OF THIS TERM ARE SUBSTANTIALLY UNIFORM IN HOLDING THAT IN CONDUCTING SUCH A REVIEW, THE NORMAL STANDARDS OF JUDICIAL REVIEW OF AGENCY DECISIONS, INCLUDING THE "ARBITRARY AND CAPRICIOUS" AND THE "SUBSTANTIAL EVIDENCE" RULE SHOULD APPLY. THE LOWER COURT OPINION IN NO. 972 CLEARLY COMMANDS THE APPLICATION OF ONE OF THESE RULES; AND THE POSTURE OF THE CASE IN NO. 914 JUSTIFIES APPLICATION OF SUCH STANDARDS BY THE COURT.

Appellant contends that the term requires the court to ignore the findings of the banking agency and to assess the banking and competitive factors without reference to the agency's finding. While such a construction might be compatible with the words "de novo" alone, it is hopelessly in conflict with the concept of a "review."

A review is inevitably in the nature of re-examination of something and here the only thing which could be "reviewed" is the approval by the agency. Moreover, with specific reference to the "convenience and needs of the community to be served", serious constitutional and practical problems attend the view advocated by Justice.

In *Philadelphia,* this Honorable Court indicated grave doubts concerning the competence of courts to deal with these questions as matters of first impression.

> We are clear, however, that a merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial com-

> petence, and in any event has been made for us already, by Congress when it enacted the amended Section 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid.[48]

Of course, this kind of judgment has, historically, been assigned by the Congress to the regulatory agencies. The court has had no qualms in evaluating the performance of these agencies in particular contexts, but always with the view that the agency's expertise is to be given at least presumptive and sometimes conclusive weight.[49]

While a court might express some reservations concerning its competence on the question of what is a banking factor and how said factors serve the convenience and needs of the community, it would not be constrained in assessing the weight to be accorded those factors once the banking agency has set them out and explained its reasoning.

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[48] *Supra*, p. 371.

[49] See, e.g., *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943), *Board of Trade* v. *United States*, 314 U.S. 534 (1942), *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, *Federal Radio Commission* v. *Nelson Brothers*, 389 U.S. 266, in which words of a rough comparability with "convenience and needs" are used approvingly. Certainly, as Congressman Reuss pointed out when queried about the phrase, "They will require court interpretation" (C.R. 2/8/66, p. 2347) but as he pointed out—so did the broad language of the Sherman Act. "Convenience and needs" here encompass a careful evaluation of the spectrum of banking services offered or needed in the light of a community's economic development and requirements. See *Surburban Bank of Kansas City* v. *Jackson County State Bank*, 330 S.W. 2d 183 (Mo. 1959); *Chimney Rock National Bank of Houston* v. *State Bank Board*, 376 S.W2.d 595 (Tex. 1964); *Wall* v. *Fenner*, 76 N.W. 2d 722 (S.D. 1956).

Thus we believe that a "review *de novo*" simply means that the court will take the banking agency's findings as presumptively valid, but subject to revision should the court be convinced on its fresh examination that they are not supported by substantial evidence.

With this view, the legislative history is in accord [that is, always excepting those three Representatives who opposed the bill in the first instance, and who, when they were unable to stop its passage, attempted to accomplish much the same result in debate. On this proposition Justice—at pp. 35-6 of its brief—cites each of these Congressmen; Messrs. Patman, Reuss and Todd—the last of whom is there erroneously identified as Congressman Multer]. For example, the following exchange between Senators Javits and Hart:

Senator Javits

> If the Department of Justice does its job and the courts ultimately apply this test de novo—in short, is it not implied clearly, from the right of regulatory agencies to go into court that the court will determine this issue, and I am sure, being influenced by what the regulatory agency decided but not being bound by it.

Senator Hart

> The Senator is correct.[50]

The reference by Senator Holland

> [The bill] will give greater weight to the finding of the regulating agency without making that final in the event some bad mistake is made.[51]

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[50] Congressional Record, 2/9/66, p. 2548.

[51] *Id.*, p. 2550.

Representative Widnall remarked that

> There are very good reasons for giving the banking agencies more of a say in merger cases than is accorded some other businesses.[52]

Representative Smith, the then Chairman of the House Rules Committee, stated that "the only authority that would be left to fix standards by the Department of Justice would be the monopoly provision of the Sherman Antitrust Act"[53] but if "fixing standards" is a function of the agencies and not of Justice—and thus by derivation not of the courts—then the courts are not free to disregard the conclusion of the bank regulatory agencies.

Representative Stanton, a member of the Committee which considered the bill, quoted above at pages 27-28, characterized the action of the courts as a "review procedure." He argued that control of bank mergers should be in the hands of the banking agencies and that their opinion should not be relegated to an advisory role.

These representations are in direct conflict with the arguments of the Justice Department and are in accord with the substance of Congressional discussion on this point generally. Saving only the positions advanced by Representatives Patman, Reuss and Todd, the Congressional debates support this natural interpretation of the statute's terms.

Contrary to its representation in the Jurisdictional Statement that it was the source of the term "review

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[52] *Id.* at page 2322.

[53] *Id.*, page 2349.

de novo", Justice had originally proposed that the statute should recite a "trial *de novo*" test. In his letter of September 24, 1965, to Representative Patman, Mr. Katzenbach had recommended court review of bank mergers by "trial *de novo* of all issues in any such suit."

The expression "review *de novo*" contained in the final bill was a result of the meetings among interested agencies requested by Representative Reuss on October 20, 1965. It was incorporated among Justice's proposals amendatory to the Ashley Bill on January 5, 1966.

Without any firm evidence as to the source of the term, we suggest that the attendant circumstances support the likelihood that the term "review *de novo*" was taken from the opinion of the Fourth Circuit in the *Smithfield* case.[54] It will be recalled that Mr. Katzenbach had proposed "trial *de novo*" on September 24, 1965. The Ashley-Ottinger Bill was voted out on October 19, and Representative Reuss had proposed his substitute measure on October 20. *Smithfield* was decided October 21. The meetings referred to above took place between that date and January 3, 1966.

Smithfield, dealt, *inter alia,* with the question of the weight to be given the Comptroller's opinion granting a contested branch application. The Circuit Court remanded the case to the District Court noting that

> we will request the Court to review de novo the action of the Comptroller. (p. 273)

On the question of the difference between this phrase and the established "trial *de novo*", we believe that the

[54] *Supra*, Ftn. 10.

distinction rested on the limited nature of the appellate review which the Circuit felt that the District Court was entitled to make

> If after the court has made its fact findings, it then appears that the decision of the Comptroller is dependent upon an exercise of discretion, the Court cannot substitute its discretion for the Comptroller's. However, it can set aside such a determination if, in the light of the facts found by the Court, it concludes that the Comptroller has abused, exceeded or arbitrarily applied his discretion. (p. 272)

This case and *Smithfield* involve different statutes. However, we need not pause to evaluate the distinctions. Clearly, the juxtaposition of events illumines the intent of Congress as to the meaning of "review *de novo*" as being something less than a clear slate and more approximating the presumptive validity Congress has traditionally accorded the judgment of a regulatory agency. The decision coming just before the adoption of identical language in legislation gives rise to the presumption in *Sutherland* that

> legislative language will be interpreted on the assumption that the legislature was aware of * * * judicial decisions.[55]

Thus, while we need not reach the question whether *Smithfield* should govern us here, it does establish a definition of the meaning of the phrase "review *de novo*" which we may reasonably conclude was before the eye and within the intendment of the members of the Committees concerned with banking and the Congress as a whole when it adopted the term in BMA-66.

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[55] Sutherland, Statutory Construction, Section 4510, 3rd Ed., Horach.

The only earlier instance we have discovered of the use of the term "review de novo" in Federal jurisprudence is in *Choctaw Nation* v. *United States,* 119 U.S. 306 (1886). There, an Act of Congress of 1881 provided that the Court of Claims was authorized "to review the entire question of differences de novo . . . arising out of treaty stipulations with the Choctaw Nation." This sorry record of greed and dishonored obligations included a Treaty of 1855 effected by the Senate which made awards and adjusted claims under the most favorable circumstances to the Indians of all the treaties. It provided that all of the claims of the tribe "shall be referred to the Senate . . . for final adjudication."

The Court of Claims disregarded this settlement and the amounts still due under it because of the interpretation it placed upon the "review de novo" authorization; i.e., "the court should entirely disregard [the treaty], giving it no effect whatever." The Supreme Court reversed, holding:

> There is nothing in the language to prevent the court from giving to that award effect as *prima facie* establishing the validity of the claim so far adjudged in favor of the Choctaw Nation, leaving to the representatives of the Government in this litigation the right . . . to attack it upon the merits, as a finding unsupported by proof, or unjust and unfair in view of all the circumstances, and on that account not to be enforced. In that view, so much effect only would be given to it as to cast the burden of disproving its justness and fairness upon the United States in this suit.

The similarity of this language to subsection (e) of Section 1009, Title 5 (fn. #59, p. 51 infra) is remarkable. Nowhere are the same words used, but the identi-

cal principles are advanced in defining the function of judicial review generally and the meaning of a "review de novo" in particular.[56] The Court in this case even reaches the additional question of the locus of proof on a "review de novo".

Should this Court view the *Choctaw Nation* case as precedent, we submit that all of the principle issues in these cases must be resolved in our favor. But whatever the precedential value of the case, its logic compels an acceptance of the position we advance here.

Lower Court Interpretations

The court in *Crocker* found that the statutory scheme provided for a review of the competitive and convenience factors found by the regulatory agency. It held

> "No difficulty would be presented here so far as reviewing *de novo* the first of these determinations for this court has traditionally adjudged whether

[56] Compare also with judicial recitation of the permissible extent of judicial review. See; e.g. *U.S.* v. *I.C.C.*, D.C.D.C. (1963) 221 F. Supp. 584, 587 ". . . the scope of judicial review of final decision of administrative agencies is narrow. It is limited and restricted to determining whether the agency committed any errors of law, or transcended the legal limitations on its authority; whether there is substantial evidence to sustain its findings of fact; and whether the result reached was arbitrary or capricious." *Mississippi Valley Barge Line Co.* v. *U.S.*, D.C. Mo. (1966) 252 F. Supp. 162, *Sterling Davis Dairy* v. *Freeman*, D.C.N.J. (1965) 253 F. Supp. 80, *Cobb* v. *U.S.*, D.C. Ark. (1965) 240 F. Supp. 574, *Accelerated Transport-Pony Express Inc.* v. *U.S.*, D.C. Va. (1964) 227 F. Supp. 815 affd. 379 U.S. 4; *Youngblood Truck Lines Inc.* v. *U.S.*, D.C. N.C. (1963) 221 F. Supp. 809, *Great Northern Railroad Co.* v. *U.S.*, D.C. Minn. (1962) 209 F. Supp. 230, *Florida Gulfcoast Broadcasters, Inc.* v. *F.C.C.* (1965) 352 F2 726, *Fried* v. *U.S.*, D.C. N.Y. (1964) 212 F. Supp. 886, *N.L.R.B.* v. *Minnesota Mining and Mfg. Co.*, C.A. 8 (1950) 179 F2 323; *Flower Furniture Mfg. Co.* v. *Esperdy*, D.C. N.Y. (1962) 229 F. Supp. 182.

mergers have anti-competitive effects. But the problem of reviewing the second determination by the Comptroller, namely, whether the proposed transaction is outweighed in the public interest, and whether it meets the convenience and needs of the community, is plainly and unquestionably a legislative or administrative determination of a type which this court, as a constitutional court, is prohibited from deciding." (p. 12)

* * * * *

"This does not mean that the administrative order of an agency or commission may not be reviewed in a judicial proceeding in a constitutional court; but such a review is necessarily limited to the determination of questions of law and the ascertainment of whether findings of fact by the agency are supported by substantial evidence." (p. 14)

* * * * *

"It is plain to us that the congressional purpose here was to provide for an initial decision by the Comptroller and that the action brought by the Department of Justice should be deemed an action to review that decision. It is noteworthy that the section of the statute which uses the term 'de novo' does not speak of a trial de novo but of a *review* de novo.

The legislative scheme here, in our view, resembles that which is more elaborately spelled out in those sections of the Interstate Commerce Act which were discussed in the recent case of *Seaboard Air Line Co.* v. *United States,* 382 U.S. 154." (p. 19)

* * * * *

"In holding that our function now, under the 1966 Act, is to review an appropriate order of the Comptroller, we are disapproving other alternatives. One alternative would be to hold that we must disregard any suggestion for a review

and simply decide the case on the evidence now before us, applying directly the standards set forth in Section 18(c)(5). Such, we think would not be consonant with the clear purpose and intent of the Act. Plainly the whole intent was that there should be made available in determining the vaidity of bank mergers the expertise of persons familiar with banking and with the operating procedures of banks. Not only is this court constitutionally without power to evaluate such features of the 'probable effect of the transaction in meeting the convenience and needs of the community to be served' but we lack the informed experience properly to apply such tests." (pp. 26-27)

In *Provident*, the court distinguished *Crocker* on the ground that no hearing had been held in the *Provident* case. Had there been a hearing, it would have found a substantial evidence rule; but without a hearing, it found that the case fell within *Smithfield:*

"The substantial evidence rule, therefore, may be invoked only when a proper foundation is laid for it as was done in Crocker.

Therefore, the Court will hear all evidence in law and in fact, and if after it has made its findings it then appears that the decision of the Comptroller is dependent on an exercise of discretion, the Court will bow to that discretion. However, if from the fact findings, it appears that the Comptroller abused, exceeded, or arbitrarily applied his discretion, the Court will set it aside."

(See also slip opinion, 12/29/66, p. 5)

Chief Judge Miller, in *Nashville* specifically adopted the rationale of *Crocker* as to the scope and nature of the judicial review of the action of the regulatory agency. (P. 10, Slip Opinion).

This court—per curiam in *Seaboard Air Line Railroad Company* v. *United States*—382 U.S. 154 (1965) citing its previous decision in *Minneapolis & St. Louis Railroad Company* v. *United States* stated at pp. 156-7.

> Although § 5(11) does not authorize the Commission to 'ignore' the antitrust laws, *McLean Trucking Company* v. *United States,* 321 U.S. 57, 80, there can be 'little doubt that the Commission is not to measure proposals for [acquisitions] by the standards of the antitrust laws.' 321 U.S. at 85-86. The problem is one of accommodation of § 5(2) and the antitrust legislation. The Commission remains obligated to 'estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed [acquisition] and to consider them along with the advantages of improved service [and other matters in the public interest] to determine whether the [acquisition] will assist in effectuating the overall transportation policy.' 321 U.S. at 87

The same criteria should be applied here to the proposed merger. It matters not that the merger might otherwise violate the antitrust laws; the Commission has been authorized by the Congress to approve the merger of railroads if it makes adequate findings in accordance with the criteria quoted above that such a merger would be 'consistent with the public interest.'

We can find no substantive difference between the circumstances there and here. We note for the Court's convenience that the analogy between that case and this is part of the legislative history of BMA-66[57]

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[57] Congressional Record, 2/8/66, p. 2341 (Remarks of Rep. Moorhead quoted at pp. 26-7, *supra*). Note that Rep. Moorhead was cited as one of the drafters of the legislation by Rep. Grabowski. C. R. 2/8/66, p. 2355.

and was viewed by the three-judge court in *Crocker* as a strongly analogous precedent.[58]

Judicial review of administrative agency decisions not otherwise governed by the Administrative Procedure Act is generally governed by Title 5, Section 1009 of the United States Code.[59] This provides that

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[58] Slip opinion, p. 19.

[59] Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

> (a) Any person . . . adversely affected . . . shall be entitled to judicial review.
>
> (b) . . . form . . . *any special statutory review* . . . or . . . any applicable form of legal action . . . in any court of competent jurisdiction. (emphasis supplied)
>
> (c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. . . .
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> * * * * *
>
> *Scope of Review*
>
> (e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (a) compel agency action unlawfully withheld or unreasonably delayed; and (b) hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege or immunity; (3) in excess of statutory jurisdiction, authority or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error.

the factual findings of an agency will not be overturned on review if supported by substantial evidence unless the decision was arbitrary or capricious or an abuse of discretion. Is the effect of the addition of the words "de novo" such as to change this general mandate? We think not. In the *Smithfield* decision, which we believe to be the source of the term, the appellate court instructed the District Court to make full inquiry into all the relevant facts. This we believe to be the mandate of BMA-66. Review de novo simply means that the Court's inquiry into the facts is not to be restricted to those considered by the agency.[60]

The Court's refusal to apply a "substantive evidence" standard in *Smithfield* was premised upon the alleged failure of the Comptroller to make any portion of the record available to the protestant or to afford him a reasonable opportunity to be heard.[61]

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[60] As to many particular agencies, either the terms of the statute or judicial interpretation have restricted the court's review to those facts considered by the agency. Introduction of new evidence is not allowed on review. *Walled Lake Door Co.* v. *U.S.*, D.C. Mich. (1962), 31 FRD 258 (ICC); *Liacakos* v. *Kennedy*, D.C.D.C. (1961), 195 F. Supp. 630 (deportation); *Wilson & Company* v. *U.S.*, C. A. Ill. (1964), 335 F.2d 788 (F.C.C.); *Denison* v. *Udall*, D.C. Ariz. (1965), 248 F. Supp. 942 (mine claim cancellation by Dept. of Interior.).

[61] "The Court will not be held to the substantial-evidence rule, that is it will not be limited to the ascertainment of whether, on the record as a whole, there is substantial evidential and factual support for the Comptroller's action. . . . We have said the Comptroller did not act arbitrarily in not allowing a hearing. However, a necessary consequence of his unilateral procedure is that *the facts on which the Comptroller presumably acted* should not be given the preferred position accorded by the substantial-evidence rule. The rule would declare them indisputable if some reasonable basis for them may be found in the evidence. Applied here, the plaintiff would be bound by evidence offered in a proceeding in which it was not heard.

This consideration is not applicable in these merger cases, where the entire economic presentation of the merger-proponents and the decision of the bank supervisory agency are made available to the Department of Justice. Its opinion is solicited and carefully considered. Should it seek a hearing in any of these cases, it need but ask.

The circumstances which the court in *Smithfield* felt justified denial of the substantial evidence standard were not present in *Provident*. Thus we feel that the substantial evidence rule, as well as the arbitrary and capricious standard, are applicable to both of the cases here appealed. The Department of Justice had itself taken the position that full scale evidentiary hearings should not be held in all merger cases.

> Since the vast majority of applications raise no serious problems of an antitrust nature, there would seem to be little point in subjecting all merger applications before the regulatory authorities to all of the requirements of the Administrative Procedure Act in order to lay the ground work for court review in those few instances

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> Hence, there is no place in the review for an opening-presumption of correctness of any fact which it may appear to the Court was adopted by the Comptroller for his decision." (Emphasis supplied) pg. 271-272

The dissent also buttresses this interpretation.

> "If the Comptroller wishes to continue to use informal proceedings to deal with branch applications he must make sure that the proceedings are fair. Banks potentially affected, which desire to contest an application, should be permitted reasonable access to relevant materials and an opportunity to have their say, if only informally. I would remand the case to the District Court for its return to the Comptroller with instructions to make available to the plaintiff the requested information." (pg. 275)

where serious questions of competition are presented.[62]

Since the statute itself (5 U.S.C. § 1009) requires no hearing; the aggrieved party (here Justice) did not feel them necessary except in a "few instances"; and the aggrieved party did not seek one in any of the cases before this court;[63] it would not seem that any rational basis has been established for denying the application of the statutory standard here.

Further, in construing statutes setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of that statute.[64]

And if we accept Justice's proposed metamorphosis of the term into a "trial de novo," affording no recognition to the agency's determination, we violate the scheme of the general statute without any clear mandate in the specific statute.[65]

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[62] Fn. 15, *supra.*

[63] Indeed, it refused to participate in a court-directed hearing in the *Crocker* case.

[64] *United States* v. *Morgan,* 307 U.S. 183, 191, (1939). *Reich* v. *Webb,* C.A. Cal. 1964, 336 F.2d 153, cert. denied, 380 U.S. 915.

[65] Those few instances where the agency's decision is not accorded presumptive validity are quite explicit, and are *strictly* limited to the monetary value of cash awards granted by such agencies. (A traditional judicial function) Thus, as to money awards by the National Railroad Adjustment Board, the Board's findings of fact are, by the terms of the statute, only "prima

B. A "TRIAL DE NOVO" APPROACH AS ADVOCATED BY THE DEPARTMENT OF JUSTICE WOULD REQUIRE THE COURTS TO USURP ADMINISTRATIVE AND LEGISLATIVE FUNCTIONS IN MAKING AN INDEPENDENT DETERMINATION OF THE PUBLIC INTEREST IN ANY BANK MERGER CASE; SUCH AN APPROACH POSES SERIOUS CONSTITUTIONAL QUESTIONS.

The difficulties connected with inquiry by the courts into the essentially administrative function of determining the "convenience and needs of the community to be served"[66] have already been adverted to by this court in its opinion in the *Philadelphia Bank* case:

> We are clear, however, that a merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence . . .[67]

The constitutional issues arising out of judicial review of administrative determinations have already received considerable attention in this court. In *Keller v. Potomac Electric Co.,* 261 U.S. 428, 444 the statute provided for judicial review of administrative rate making:

> The Court is, therefore, given jurisdiction to review the entire record and to make the order or decree which the Commission and the District Courts should have made.

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facie" valid with a presumption similar to that accorded expert testimony and otherwise such suits "shall proceed in all respects as other civil suits." (45 U.S.C. § 153) See *Russ* v. *Southern Ry. Co.;* C.A. Tenn. (1964) 334 F.2d 224, cert. den. 379 U.S. 991. Similarly, see 7 U.S.C. § 499b and *John J. Trombetta Co.* v. *Goldstein & Procacci,* D.C. Pa., 1961, 198 F. Supp. 288 for an analagous agricultural statute.

[66] See, e.g. Radio Comm. v. G.E. Co., *infra.*

[67] *Supra*, p. 371.

> Such legislative or administrative jurisdiction, it is well settled cannot be conferred on this Court either directly or by appeal . . . The jurisdiction of this Court and of the inferior courts of the United States ordained and established by Congress under and by virtue of the third article of the Constitution is limited to cases and controversies in such form that the judicial power is capable of acting on them and does not extend to an issue of constitutional law framed by Congress for the purpose of evoking the advice of this Court . . . to administrative or legislative issues or controversies.

In *Radio Commission* v. *General Electric Company,* 281 U.S. 464, the question to be decided was whether the "public convenience and necessity" would or would not be served by renewing the existing license without change. This Court observed that it

> is invested with judicial powers only and can have no jurisdiction other than of cases and controversies falling in the classes enumerated in that article [judiciary article of the Constitution]. It cannot exercise or participate in the exercise of functions which are essentially legislative or administrative. (p. 469)
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> . . . the proceeding . . . is not a case or controversy . . . but is an administrative proceeding and therefore that the decision therein is not reviewable by this court. (p. 470)

That this Court may review the decision of an administrative agency without interjecting itself into the administrative decision making process was noted by Mr. Justice Douglas in *Federal Power Commission* v. *Idaho Power Company,* 344 U.S. 17, 21.

> The Court, it is true, has power "to affirm, modify, or set aside" the order of the Commission "in whole or in part" . . . But that authority is not power to exercise an essentially administrative

> function . . . The nature of the determination . . . the project adopted "shall be such as in the judgment of the Commission shall be best adopted to a comprehensive plan . . . for . . . beneficial public uses." Whether that objective may be achieved if the contested conditions are stricken from the order is an administrative, not a judicial, decision.

A number of state courts have considered this constitutional question as it specifically applies to legislative directions for "trial de novo" on judicial review of administrative determinations. These cases have generally found the proposal an unconstitutional invasion of the legislative or administrative process.

Thus, in *Household Finance Corporation* v. *State,* 244 P.2d 260, a Washington statute provided that on appeal from a branch authorization decision of the Superintendent of Banking "a trial shall be had in . . . Court de novo." The trial court concluded that a *trial de novo*

> means a new and independent trial on the law and facts from which the Superior Court shall determine whether or not in this case the license should be granted in view of all the facts and circumstances as disclosed by the evidence and the law applicable to the case.[68]

That court found the proposal unconstitutional. The appellate court agreed.

> It [the trial court] is also correct in its ultimate conclusion that the scope of its inquiry under

[68] As reported in the appellate opinion at p. 262. Compare with the Justice Department's proposal here that the trial court should make its examination "free of presumptions traceable to anyone" (Pretrial brief, Dept. of Justice, *U.S.* v. *Provident N.B.* et al., p. 28).

> this statute is limited to determining whether or not the supervisor had acted arbitrarily, capriciously or contrary to law. (p. 262)
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> * * * *
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> We are constrained to hold that the [section of the statute] which purports to vest in this . . . court . . . the right to reverse on a trial de novo a decision of the supervisor with reference to the granting of such a license and, in effect, to substitute its judgment for that of the supervisor as to whether or not a license should issue, is unconstitutional as an attempt to vest a nonjudicial power in a constitutionally created court. We must reject this expansion of the courts' power as firmly as we would resist a reduction of its rightful authority. (p. 263.)

As to the appropriateness of judicial inquiry into an administrative test not very dissimilar from "convenience and needs," the court then observed

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> Appellant contended that the supervisor did not give sufficient weight to the *"convenience and advantage' of the respective communities"* . . . (pp. 265, 266) Even if the court should disagree with the supervisor's findings, still the court may not substitute its judgment for that of the supervisor upon this question. From the evidence in this case we cannot find that he acted arbitrarily or capriciously in arriving at the findings upon which he based the denial of these applications. (P. 267) [Emphasis supplied.]

Rather then declare a judicial "trial de novo" unconstitutional, some courts have carefully strictured its meaning. Thus in *State Board of Medical Registration* v. *Scherer,* 46 N.E. 2d 602, (1943) the highest court in Indiana held:

> The granting and revocation of licenses . . . is a ministerial function . . . these . . . duties may not

> be delegated to courts, and that the so-called appeal provisions of statutes which undertake to vest in courts jurisdiction to try and determine de novo the facts . . . must be treated as merely providing procedure by which the proceeding may be brought before the court for an investigation to determine whether the ministerial body has acted legally and within its powers. (p. 603)
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> * * * *
>
> . . . the only jurisdiction of the court is to review the decision of the board, and . . . the decision of the board must be sustained if it is supported by substantial evidence . . . (p. 605)

A series of Texas cases, summarized in *Jones* v. *Marsh,* 224 S.W. 2, 198, provide that a judicial review of administrative determinations [as to which, on "proceedings on appeal, trial shall be *de novo* under the same rules as ordinary civil cases"], shall be limited to ascertaining whether the administrative determination is supported by substantial evidence, even though, taken literally, the statute "seems to sustain the conclusion . . . that the substantial evidence rule does not apply to the trial in district court" (p. 201).

A procedure recommending itself to us here in giving content to a "review de novo" was adopted by a Connecticut court in ruling on the purpose and effect of a trial de novo on appeal from a liquor license revocation. In *DeMond* v. *Liquor Control Commission,* 30 A2 547 (1943), the Court first ruled that "administrative functions [can] not constitutionally be vested in the courts" (p. 548); it then proposed:

> The requirement of a trial de novo can be given full effect within constitutional limitations. Previous to the enactment of the statute, we held that in appeals under this act as in other similar situations the question for the court to determine is

> whether the commissioner acted arbitrarily, illegally or in abuse of its discretion, and that this is to be determined upon the basis of the proceedings before it, if they were available, or upon a finding of facts by the court upon the assumption that these are the facts upon which the commission acted . . . The issue is still, are there legal and reasonable grounds for its action; but the court, in reaching its decision, is not confined, as heretofore, to the facts actually or assumed to have been proven before the commission; it conducts an independent inquiry. In this sense only is the trial de novo . . . "upon these appeals the court hears and considers all pertinent matters for the purposes of reaching an intelligent conclusion as to the legal propriety of the action of the commissioners. In this qualified sense, but in no other, is its hearing one de novo."
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> The other addition to the statute, that the court may reverse or affirm, wholly or partly, or may modify or revise the decision of the commissioner, does not indicate a different intent. Under that provision, the court cannot, on an appeal, substitute its discretion for that vested in the liquor control commission; it can go no further than to make the decision of the commission conform to law or to a conclusion which is *the only* reasonable one upon the facts proven (emphasis supplied) . . .
>
> As the appeal is . . . a process for invoking the power of the court to decide whether, upon the facts it finds proven, the decision of the commission is unwarranted in law or in abuse of its discretion, the amendments to the act did not change the nature of the proceeding. (p. 549).[69]

But we see no need to torture the statutory provision before us into a trial de novo mold which can only

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[69] See also *American Beauty Homes Corp.* v. *Louisville and Jefferson County Planning and Zoning Commission*, 379 S. W. 2d 450.

raise unnecessary questions. As this court stated in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.* 301 U.S. 1 at page 30:

> The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute by one of which it could be unconstitutional and by the other valid, our plain duty is to adopt that which shall save the act. *Even to avoid a serious doubt, the rule is the same.* (Emphasis supplied)

If we simply treat the words "review de novo" as permitting the Court to examine all of the facts presented by the parties before deciding whether the agency was arbitrary and capricious in its determination and view the record on which the court is to determine whether there is substantial evidence to support the verdict of the administrative agency as all of the facts examined by the agency and all of the facts presented to the court, then we avoid all constitutional issues. The courts' review of a banking agency decision varies from other agency review only in that the record is not foreclosed to the parties.

C. THE TERM "CLEARLY OUTWEIGH" IS CLARIFIED IN THE LEGISLATIVE HISTORY AS MEANING ONLY A PREPONDERANCE OF THE EVIDENCE. THERE IS NO MERIT TO THE CONTENTION THAT THE EVIDENCE SUPPORTING A FINDING ON "CONVENIENCE AND NEEDS" MUST BE OVERWHELMING.

The Justice Department argues vigorously that this term means an overwhelming preponderance of facts in support of "convenience and needs" is required to overcome any anticompetitive effects.

We believe that the plain meaning of the words, without reference to any legislative history, is simply that the two criteria are to be balanced; doubt as to

which factor predominates is to be resolved in favor of the competitive factors. Should there be no doubt, even if the Court's balance be one microgram in favor of "convenience and need," then that factor should prevail. But, if Justice is right, then Congress did not mean what it said, it meant "clearly outweigh by a considerable margin" or words to that effect.

That the simple, logical meaning of the phrase was intended is substantiated by the bulk of the congressional dialogue on the bill. See, e.g., the quotations from remarks of Representatives Smith (Va.), Brock, Ashley, Moorhead, Stephens, and Stanton which are cited above.[70]

Justice conceives that the Committee report, in the sentence quoted below, supports its contention that the convenience and needs factor is to be a rare "exception" to the "predominant" competitive factors. This colloquy between Representative Widnall and the author of the bill, Representative Ashley, during floor debate on the bill negates this contention and establishes the intent of the Committee that the convenience and needs and competitive factors were to be balanced as correlative terms.

Mr. Widnall:

> [In] . . . the committee report, it is stated . . . "permits an exception . . . where it is clearly shown that a given merger is so beneficial to the convenience and needs of the community to be served—recognizing that effects outside the section of the country involved may be relevant to the capacity of the institutions to meet the convenience and needs of the community to be served—

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[70] At pp. 24-9, *supra*.

that it would be in the public interest to permit it."

Would the gentleman care to comment on the precise sense in which the word "so" is used in this paragraph?

Mr. Ashley:

The word "so" is used in the sense of "in just such a degree" and relates directly to the last clause of the sentence from which the gentleman has quoted. In other words, the merger must be shown to be sufficiently beneficial in meeting the convenience and needs of the community to be served that, *on balance,* it may properly be regarded as in the public interest. (emphasis supplied) p. 2339

Senator Robertson reported the bill to the Senate as follows:

This bill . . . takes into account both the competitive factors on which the Antitrust Laws are based . . . and the convenience and needs of the public to be served by the proposed merger bill . . . to be considered along with the competitive factors, equally, neither element being controlling. p. 2538

Chairman Celler of the House Judiciary Committee discussed the question of the need for "convenience and needs" to outweigh antitrust considerations at length without ever mentioning the word "clearly" (p. 2341).

The following exchange between Congressman Stephens (a committee member) and Congressman

Ashley also establishes the underlying balancing function of the two tests:

Mr. Stephens:

> The major compromise comes about in this fashion. The bill provides that the Antitrust Laws do pertain to banks, but that the banks being already regulated—the banks being different from any other kind of business—the banks should be under the Antitrust Laws and the competitive factors only if they are weighed in the light of considerations that are peculiar to banks. These factors we try to set up in the measure.
>
> So we have compromised ideas and said that the Antitrust Laws do pertain to banks if the criteria for bank mergers are not such *as set in the bill,* but that diminution of competition in a merger is not the sole factor to be taken into consideration. (emphasis supplied)

* * *

Mr. Ashley:

> Is the gentleman saying as I believe he is that it is the consensus of the committee, in drafting this bill that the public interest is to be considered as combining the consideration both of the antitrust competitive factors of a particular merger on the one hand, and on the other, the needs and convenience of the community that may derive from that merger, which, as I say, may result in a diminution of competition; in other words, that the public interest has got to involve a consideration of both of these rather considerable factors?

Mr. Stephens:

> This is correct, and that is what we attempted to put into this bill as a compromise because of the flat statement of the Court [in Philadelphia National Bank] concerning antitrust laws per-

taining to banks which is: If there is a diminution of competition, there shall not be a merger. You have to take into consideration, too, that when we talk about public interest, we know public interest is already taken care of in the banking industry, even if we did not have this legislation, because it is a regulated industry. The justification of a regulation is in the fact that banks affect closely the public and its interest must be protected. P. 2324

Moreover, the term "clearly outweigh" implies that the balancing must take place in a concrete context; that is, the strength which the "convenience and needs" must demonstrate will vary in precise proportion with the strength of the allegedly anticompetitive effect. The more remote and unlikely the eventuality of competitive harm, the less pressing the convenience and needs that must be shown.

Finally, Representative Reuss, who exercised every opportunity to construe the statute's terms restrictively, apparently also viewed the word "clearly" as relevant to the quality of the evidence rather than the quantity, for in reporting another difference between his bill and the Ashley-Ottinger bill he noted:

> The Reuss proposal, properly, I think *requires the approval* of a merger where "convenience and needs" outweighs the anticompetitive effects.[1]

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[1] Letter, Rep. Reuss to Attorney General Katzenbach was reported in. H.R. #1221, 89th Cong. 2d Session. (10/20/65)

D. THE JUSTICE DEPARTMENT IS ADEQUATELY ADVISED OF THE FACTORS CONSIDERED BY THE COMPTROLLER IN DETERMINING THE CONVENIENCE AND NEEDS OF THE COMMUNITY TO BE SERVED BY A MERGER. THE PLEADINGS IN NEITHER CASE WOULD BE SUFFICIENT TO JUSTIFY A JUDGMENT FOR THE DEPARTMENT OF JUSTICE BEFORE THE INTRODUCTION OF ANY EVIDENCE. AS A SUIT BY JUSTICE PRESUPPOSES ERROR BY THE BANKING AGENCY IN THE APPLICATION OF STATUTORY CRITERIA, THE SUIT IS AN ATTACK ON THE AGENCY'S DETERMINATION THAT CONVENIENCE AND NEEDS OUTWEIGHED THE ANTICOMPETITIVE EFFECT OF THE MERGER, IF ANY. AS THE AGENCY'S DETERMINATION HAS A PRESUMPTIVE VALIDITY, THE PLAINTIFF MUST BE REQUIRED TO DISPROVE THE AGENCY CONCLUSIONS. BMA-66 DOES NOT PROVIDE AN EXCEPTION; IT IS A COMPLETE STATUTORY SCHEME.

The Department of Justice contends that this phrase, "Convenience and Needs," is defensive matter, partly because of its contention that Clayton § 7 has continued applicability, and partly because it should not be compelled to speculate as to what factors are considered.

As part of their "Application to Merge," national banks are required to file a substantial "Economic Brief" which is in large part devoted to a showing of the ways in which the proposed merger will serve the needs of the community. In addition, the opinion of the Comptroller[72] sets out his findings on the convenience and needs factors.[73] Thus, any necessity for Justice to grope blindly for putative "convenience and needs" factor is more theatrical than real. No one, of course, would preclude the court from inquiring into possible additional factors (Compare Fn 7a in

[72] In the *Houston* case, no opinion of the Comptroller was published until December 1, 1966 This was, however, some 19 days prior to appellant's decision not to assume the burden of negativing these factors.

[73] See in particular pp. 14 and 22-25 of the Opinion dated 12/1/66 and reproduced as Appendix C to appellant's brief at pp. 83, et seq.

the Jurisdictional Statement). This, however, raises questions of the *order*, not the burden, of proof.

The test for determining which party has the burden of establishing a case or issue is found in the result of an inquiry as to which party would be successful if no evidence at all were given, the burden being, of course, on the adverse party.[74] This rule was recently restated by Judge Yankwich in a 9th Circuit case:

> The question as to whether the burden of proof in its primary sense rests upon the plaintiff or defendant is ordinarily to be determined by ascertaining from the pleadings which of the parties without evidence would be compelled to submit to an adverse judgment before the introduction of any evidence.[75]

Let us assume, arguendo, in this case that plaintiff was to prove that, among financial institutions, in a reasonably premised, adequate "section of the country" this merger would tend to substantially lessen competition and stop there. Could it prevail in the absence of further evidence from any party? We think clearly not.

The procedural scheme of BMA-66 contemplates that a proposed merger will be tested by the bank regulatory agency under the statutory criteria and if that agency finds the criteria have been met it will—only then—approve the proposal. Then, if Justice believes that the bank regulatory agency erred in applying these criteria, it may move the courts to review the decision of that regulatory agency. Thus, ab initio, Justice's suit must be premised on agency error. But

[74] Corpus Juris Secundum, Evidence § 104.

[75] *Pacific Portland Cement Company* v. *Food Machinery and Chemical Corp.*, C.A. Calif. 178 F. 2d 541, 547 (1949).

since proof that competition might suffer is not proof that the agency erred (since the merger might still be properly approved), Justice is under the further constraint of proving that the statute was violated—i.e., that "convenience and needs" did not outweigh the anticompetitive effects. For, lacking any evidence on the question, the presumption of regularity which attaches to the decisions of the regulatory agency would then require a dismissal of the complaint.

> The general presumption is that no official or person acting under an oath of office will do anything contrary to his official duty, or omit anything which his official duty requires to be done.[76]

This particular application is in accord with the general rule that the plaintiff has the burden of proof as to all the elements of his claim or cause of action.[77] The failure of the plaintiff to sustain such burden is fatal to his recovery.[78] The fact that the establishment of an affirmative case requires proof of a material negative allegation (anticompetitive effects not out-

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[76] *Matter of Marcellus,* 165 N.Y. 70, 75, 58 N.E. 796, 798. *J. B. Montgomery, Inc.* v. *U.S.,* D.C. Colo. (1962) 206 F. Supp. 455 Affd. 376 U.S. 389. *Accelerated Transport-Pony Express, Inc.* v. *U.S.,* D.C. Vt. (1964) 227 F. Supp. 815; Affd. 379 U.S. 4; *Federal Communications Commission* v. *Schreiber* (1965) 381 U.S. 278; *U.S. ex rel Harris* v. *Ragen,* C.A. Ill. (1949) 177 F2 303, *B. & O. Railroad Co.* v. *U.S.,* D.C. Pa. (1965) 249 F. Supp. 712; *Eastern Central Motor Carrier Assn.* v. *U.S.,* D.C.D.C. (1965) 239 F. Supp. 591.

[77] *Bell* v. *Pennsylvania Railroad Co.,* C.A. Ill. 284 F. 2d 297 (1960); New York, *N.H. & H. Railroad Co.* v. *Seaboard Sales Corp.,* C.A. Mass. 258 F. 2d 376 (1958).

[78] *Stelling* v. *Richmond County,* 66 S.E. 2d 807.

weighed by convenience and needs);[79] such as that the case does not come within exception provided for, does not save the party who makes such an allegation from the burden of pleading[80] and proving[81] it.

With this conclusion, the courts seem to be in uniform accord:

> It seems to be well settled that where the plaintiff in stating his cause of action must affirm a negative, he has the burden of proving the negative averment * * *. This rule applies alike to pleading statutes or contracts.[82]

The relevance of the locus of the burden to this appeal is this. A complaint has been filed, proof of the material elements of which will not establish even a prima facie violation of any statute. It appears inescapable then that plaintiff's pleading is fatally defective.

The further proposition advanced on this point; that "convenience and needs" is a "justification or exemption under a special exception to the prohibitions of a

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[79] We do not, however, accept the "convenience and needs" tests as a negative element of the statute. Since the entire enacting clause is framed in the negative ["The responsible agency shall not approve"] this creates a double negative or an affirmative posture for the convenience and needs factor. Recasting the entire clause in the affirmative; it would read, "The responsible agency shall approve any merger in which the convenience and needs of the community to be served clearly outweighs any substantially anticompetitive effects thereof."

[80] *Meeks* v. *Meeks,* 25 So. 668 (Ala. 1946); *Hyde* v. *Chappell,* 22 S.E. 2d 313 (Ga. 1942).

[81] Corpus Juris Secundum, Evidence § 105.

[82] *Protective Life Insurance Co.* v. *Swink,* 132 So. 728, 728 (Ala. 1931). See also cases cited in footnote 77 *supra.*

statute generally" and therefore a matter of defense, simply ignores the origins and the purposes of BMA-66.

It must be apparent from the most cursory examination of 5(B) that "Convenience and needs" and "substantially anticompetitive effects" are coordinate factors whose juxtaposition evidenced a Congressional purpose of judicial balancing. With this obvious interpretation the legislative history is, naturally, in accord. Compare quotation from Rep. Smith (Va.), Rep. Smith (Calif.), and Reps. Widnall, Moorhead and Stanton and Senator Proxmire, pp. 24-8, *supra*.

Of course, a decision by this Court that the courts below were substantially correct in their analysis of the nature of the judicial review to be had in these cases would render this discussion largely academic. For if the judicial function is to review the decision of the bank regulatory agency, then the entire emphasis of the suit must be an affirmative assault by Justice on the findings of the agency both as to competitive and banking factors. "Convenience and needs" must —perforce—be an affirmative part of Justice's case.

E. THE OMISSION OF THE PHRASE "LINE OF COMMERCE", TOGETHER WITH THE LEGISLATIVE HISTORY OF THE BANK MERGER ACT OF 1966, CLEARLY DEMONSTRATES THE INTENT OF CONGRESS TO REMOVE BANK MERGERS FROM THE NARROW CONFINES OF SECTION 7 OF THE CLAYTON ACT AND TO IMPOSE A QUALITATIVE COMPETITIVE STANDARD ENCOMPASSING THE ENTIRE FIELD OF FINANCIAL INSTITUTIONS RATHER THAN A QUANTITATIVE STANDARD APPLICABLE ONLY TO COMMERCIAL BANKING.

The Clayton Act, Section 7, reads in pertinent part:

> No corporation . . . shall acquire the . . . stock . . . or . . . assets of another corporation . . . where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.[83]

The Bank Merger Act of 1966, Section 5(B) reads in pertinent part:

> (5) The responsible agency shall not approve—
>
> * * * *
>
> Any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition or to tend to create a monopoly, or which in any other manner would be in restraint of trade. . .[84]

Justice in several of its arguments in the Courts below had postulated that the omission was either harmless error or a deliberate stylistic device to avoid redundancy in a statute where commercial banking comprised the applicable universe.

This argument ignores the canons of statutory construction ". . . thus the legislative language will be interpreted on the assumption . . . that if a change

[83] 15 U.S.C. § 18.

[84] Appendix D, *infra*.

occurs in legislative language, a change was intended in legislative result."[85] Further, the legislative history of this particular omission impels a conclusion of intent. In *Philadelphia,* supra, the defendants had maintained that commercial banking was not sufficiently distinct to comprise a line of commerce. While the Court agreed that:

> [M]any other institutions are in the business of supplying credit and so [are] more or less in competition with commercial banks . . . for example: mutual savings banks, savings and loan associations, credit unions, personal finance companies, sales finance companies, private businessmen (through the furnishing of trade credit) factors, direct-lending government agencies, the Post Office, Small Business Investment Corporations, life insurance companies.[86]

it nevertheless found that commercial banking was an appropriate line of commerce within which to measure the effects of the merger.

> Some commercial banking products . . . are *"free of effective competition from . . . other financial institutions."* (Emphasis supplied.)[87]

The Congressional committees considering the Bank Merger Act were not insensitive to this issue. That the committee had the phrase before it in its consideration of this statute is clear from the House Committee Report accompanying the enacted bill, where the Committee noted:

> On the other hand, your committee has heard the contention advanced with equal vigor . . . that

[85] Sutherland, Statutory Construction, Sec. 4510, 3rd Ed.

[86] *Supra* p. 326.

[87] *Ibid.*

any bank merger whose effect may be substantially to lessen competition in any one *line of commerce* in any one section of the country should on that ground alone be absolutely prohibited . . . (Emphasis supplied)[88]

The parent Ashley-Ottinger Bill contained no "line of commerce" test. There, the reason for the omission was plainly articulated in the accompanying Committee Report.

> The Committee recognized that commercial banks *face intensive competition from other financial institutions*—savings and loan associations, mutual savings banks, insurance companies, finance companies, and so forth. The Committee also recognized that competition between commercial banks and other institutions includes local competition, regional competition, national competition and even international competition for one part or another of business. To overlook anyone of these aspects of competition, or to concentrate on one of them to the exclusion of the others, would be unrealistic and might well diminish, not increase, financial competition. (Emphasis supplied.)[89]

As was demonstrated above, the Ashley-Ottinger bill is in substance the bill enacted. The report's contents deserve, therefore, substantial weight as relevant legislative history.

Further to the same point were the remarks of Senator Robertson in introducing the Bill on the floor of the Senate:

> It will be noted that the prohibitory language is based generally on the terms of section 1 of the

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[88] H. R. 1221, *supra*.

[89] H. R. 1179, 10/19/65.

Sherman Act and section 7 of the Clayton Act. Section 1 of the Sherman Act (15 U.S.C. 1) prohibits contracts, combinations, and conspiracies "in restraint of trade or commerce" while section 7 of the Clayton Act (15 U.S.C. 18), as amended in 1950, prohibits acquisitions" where in any line of commerce in any section of the country the effect may be substantially to lessen competition, or to tend to create a monopoly."

The text of paragraph (B) of the new bill follows the terms of section 1 of the Sherman Act and section 7 of the Clayton Act, with the exception that the reference to "any line of commerce" in the Clayton Act is not carried over into the new bill. In this respect the new bill resembles the Bank Merger Act of 1960, and calls for an appraisal of the overall effects of the merger on competition, weighing increases of competition in one field against decreases in competition in another field. The banking agencies and the courts, in other words, are not intended and are not permitted to select some single, perhaps minor aspect of the banks' business and to say that, because there is some lessening of competition in this element of the business, the overall effects of the merger—the increase of competition in the entire field of banking and in the broader field of financial institutions which may result from other aspects of the merger—are irrelevant and may not be considered.

As the Banking and Currency Committee said in 1959 in reporting out the Bank Merger Act of 1960, we do not want the banking agencies and the courts to say, as did Judge Weinfeld in the Bethlehem-Youngstown merger, "If the merger offends the statute in any relevant market then good motives and even demonstrable benefits are irrelevant and afford no defense." (*U.S.A.* v. *Bethlehem Steel Corp. et al.*, 168 F. Supp. 576, 1958; see Senate Report No. 196, 86th Cong., S. 1062, pp. 5-6)

> We do not want the court to say, as it did in the Philadelphia case, that a merger which may substantially lessen competition in one line of business in one section of the country "is not saved because, on some ultimate reckoning of social debits and credits, it may be deemed beneficial." We do not want the court to apply a statute which, in the words of the court in the Philadelphia case, proscribes "anticompetitive mergers, the benign and the malignant alike." (Hearings on S. 1698, p. 402)
>
> In considering whether a proposed merger may lessen competition or tend to create a monopoly or be in restraint of trade, the banking agencies and the courts will, of course, takes into consideration all the factors which I have discussed under the question of monopoly—the competition from other financial institutions in one or another part of its business, the competition from other banks and other financial institutions, locally, regionally, nationally and internationally, the inevitable limitations on competition imposed by statute and by regulatory authorities, with respect to entry into the business and with respect to the carrying on of the business. All of these factors must be taken into consideration in weighing the overall anticompetitive effects of the proposed merger.[90]

As the underlined portions of the *Philadelphia* opinion and the Ashley-Ottinger committee report emphasize, the House Committee was fully aware of the line of commerce found in Philadelphia and was—plainly—dissatisfied. This same Committee reported out a bill preserving the entire Ashley-Ottinger proposal—virtually identical with it in terminology and precisely identical in purport. It similarly excluded a "line of

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[90] Cong. Rec. 2/9/66 P2541-2.

commerce' test. Justice would have us blind ourselves to this dispositive legislative history.

We believe that this planned omission of a Clayton Act standard with a well-settled judicial construction must be taken as a Congressional mandate that the Court is *not* to consider commercial banking as an area of effective competition, but rather establishes—in banking—a market test measurable only by larger commercial realities, i.e., "financial institutions."

The omission of this Clayton Act test further validates the conclusion that it was the intent of Congress to create a new and different statutory standard.

F. THE SUGGESTION THAT THE BANK MERGER ACT OF 1966 IS MERELY A REASSERTION OF THE "FAILING COMPANY" DOCTRINE IS WITHOUT MERIT. CONGRESS CANNOT BE PRESUMED TO PASS UNNECESSARY LEGISLATION. IN ADDITION, THE LEGISLATIVE HISTORY FULLY SUPPORTS THE CONCLUSION THAT MERGERS OF SOUND, COMPETING BANKS COULD BE SUSTAINED UNDER THE STANDARDS OF THE BANK MERGER ACT OF 1966.

Appellant suggests that the *real* purpose of the 1966 Bank Merger Act was to make sure that banks in financial straits could be merged into safer institutions without fear of running afoul of the antitrust laws. This, it proposes, is the substance of the phrase "convenience and needs" of the community.

The failing company doctrine is well recognized in antitrust law. Its broader application to banking cases was carefully noted in *Philadelphia Bank*.

> Section 7 does not mandate cutthroat competition in the banking industry, and does not exclude defenses based on dangers to liquidity or solvency, if to correct them a merger is necessary.*
>
> * This, arguably, the so-called failing company defenses, * * * might have somewhat larger countours as applied to bank mergers because of the

greater public impact of a bank failure compared with ordinary business failures.[91]

But if the whole court could subscribe to this notion (and the dissent did so by implication) what valid purpose would be served by solemnly enacting a judicially recognized—and indeed unopposed—principle? We may not assume that Congress legislates to no purpose.

The Committee report and the congressional dialogue also contradict this contention. Although the committee report specifically adverts to the "floundering bank problem" it was in a context explaining that "the disagreements between the Department of Justice and the banking agencies seem to have revolved, *among other things,* around . . . the floundering bank problem and the relevant market problem" (Comm, Rpt. p. 2). This is not to say that Congress' concern was only over these two factors (nor were the disputes between the agencies so limited—as the underlined portion shows). The following exchange during the House debates is quite succinct.

Mr. Weltner:

> Is the gentleman saying that the only criterion for public interest as used in the bill is some standard developed around the adequacy of banking facilities?

Mr. Stanton:

No. (p. 2344)

Representative Fino also expressed an unequivocal opinion of a broad base to the pubic interest factors:

> The third aim of the bill, as I see it, is to weaken the applicability of the Antitrust Laws to bank-

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[91] supra, pp. 371-2.

ing by allowing economic factors to sometimes outweigh competition per se.

. . . I also favor the occasional downgrading of strict antitrust criteria where competition per se is clearly not so important in a given situation as the economic effects of the merger—by which I mean better banking service to the community. P. 2340

Plaintiff's argument is without merit.

The Court in *Crocker* categorically rejected this contention:

"[T]he language * * * from Seaboard * * * would seem to make negative another argument of the Government * * * that * * * 'convenience and needs of the community to be served' is but a reiteration of the 'failing company doctrine' long recognized as 'an integral part of settled antitrust law.' No such limiting suggestion was ever made in the Seaboard Air Line case and the other cases dealing with the same statute. In our view it would be absurd to find that the new standards so carefully framed for the 1966 Bank Merger Act were no more than the inclusion of a wholly unnecessary reference to the 'failing company doctrine.' There is not the slightest indication in the language of the Act, or in its legislative history, to support the Government's effort thus to cancel or dissipate the declared purpose of the Act." (pp. 20-21 Slip Opinion 10/6/66)

As did the court in *Nashville:*

"The plaintiff's restrictive interpretation of the 1966 amendment finds little support either in legislative history or in the text of the amendment itself. On the contrary, both legislative history and the textual provisions of the amendment strongly indicate that it was the intent of Con-

gress to effect substantial changes in existing antitrust law relative to bank mergers as enunciated in the Lexington and Phiadelphia cases." (pp. 12-13 Slip Opinion 11/22/66)

Both Chief Judge Clary in *Provident* and Chief Judge Pence in *Hawaii* have specifically endorsed the opinion in *Crocker*.

G. THE BANK MERGER ACT OF 1966 IS, IN ITSELF, AN ANTITRUST LAW WHICH IS THE SOLE STANDARD UPON WHICH TO ASSESS THE LEGALITY OF A BANK MERGER. CONGRESS HAD A SPECIFIC OPPORTUNITY DURING CONSIDERATION OF THIS LEGISLATION TO REASSERT THE APPLICABILITY OF SECTION 7 OF THE CLAYTON ACT TO BANK MERGERS, BUT SUBSTITUTED THE MORE LIBERAL TERMS OF BMA-66 INSTEAD.

Justice's main thrust on the continued applicability of Clayton 7 is that BMA-66, in several places, speaks of violation of antitrust laws; that Section 7 is an antitrust law and therefore it continues to apply. But the legislative history simply will not support the continued application of that statute nor does the logic of continued antitrust applicability support the necessary inclusion of any particular expression of that body of laws.

While Justice is correct that Section 5(A) "is virtually a paraphrasing of Section 2 of the Sherman Act"—indeed it is a paraphrase—this similarity cannot bolster 5(B), since the applicability of Sherman 2 is stated, in so many words, in 7(b), 7(c), Section 2(a) and Section 2(b) of the Act. Nowhere is Sherman 1 or Clayton 7 affirmatively recited in BMA-66. Indeed, the legislative history and canons of statutory construction negative their use.

It will be recalled that, in pertinent part, the report accompanying the Ashley-Ottinger bill had exempted

various situations from antitrust prosecution—except Sherman 2—and as to the rest it "would require the courts to use the new standards of this bill in all cases instituted under the antitrust laws." Representative Reuss did not like this legislative proposal. It was, in fact, the only portion of the Ashley-Ottinger bill he originally would have changed. As indicated earlier he wished to amend section 5 (keeping the rest) to say:

> —"(A) unless it finds that such transaction would not involve a violation of section 2 of the Sherman Antitrust Act (15 U.S.C. 2).
>
> "(B) which would violate section 1 of the Sherman Antitrust Act (15 U.S.C. 1) or section 7 of the Clayton Act (15 U.S.C. 18) unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed by the probable effect of the transaction in meeting the convenience and needs of the community to be served." [92]

All interested parties readily agreed to 5(A) which actually did no more than make explicit the clear intendment of the Ashley-Ottinger bill. 5(B) was rejected. But the comparable paragraph of the Ashley-Ottinger bill differed in substance only in its failure to include the Sherman 1 and Clayton 7 standards; viz:

> A merger transaction which tends to lessen competition may be approved where the probable adverse competitive effect thereof is clearly outweighed in the public interest by the probable effect of such transaction in meeting the convenience and needs of the community to be served.[93]

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[92] Fn. 18, *supra*.

[93] Appendix D.

Compare further the language of the bill as ultimately enacted:

> The [court and the] responsible agency shall not approve . . . any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.[94]

But the series of conferences between the Department of the Treasury, the Department of Justice and the bank regulatory agencies which had resulted in adoption of Representative Reuss' proposed 5(A) produced a contrary result as to 5(B). "However, our attempts to arrive at an agreed position on the language contained in part B of subsection 5 of your proposal which reads—[as above]—were not successful."[95] Now as a scanning of the three sections makes clear, the only substantial difference among them is the attempt in Representative Reuss' proposal to include Clayton 7 and Sherman 1 as specifically applicable antitrust laws. And if it were not enough that the standard was specifically inserted and specifically rejected, the proposal violated the canons of statutory construction.

Plaintiff makes much of the fact that 5(B) uses identical language to the Clayton Act. So do we. Quite clearly, the "substantive rule of law" of 5(B) which

[94] *Ibid.*

[95] Ltr. Secretary of the Treasury Fowler to Representative Reuss, 1/3/66, as reported in H. R. 1221, *supra.*

the courts are directed to apply contains something more than Clayton Act standards [convenience and needs]. It also contains something less. As more fully articulated *supra* at pp. 64-9, the omission of "any line of commerce" from the careful recitation of Clayton Act tests implies an intended change in legislative result. If Congress had intended the Clayton Act to govern bank mergers it could have said so. When Representative Reuss tried to do precisely that—and only insofar as he tried to do precisely that—his proposal was rejected.

We think that the simple answer to the meaning of the words "antitrust laws" is that they include this act. Section 2 of the Sherman Act is preserved in terms. That portion of the Clayton Act which Congress wished to use, it recited. It deleted and it added. The courts and the banking agencies were directed to apply these substantive standards (which, in part, chose from among the Clayton Act criteria). What of substance remained to which the Clayton Act might relate?

Admittedly, the application of part of the antitrust laws is being limited by inference. However, the inference is quite a clear one. After all, when one statutory standard is explicitly stated to govern a given fact situation, it does not offend logic to presume that an older, different, more general statute has been ousted. Indeed, Justice itself successfully argued this very point in *Silver*[96] when it contended in an amicus brief in this Court that certain self-regulatory powers given the stock exchanges under the SEC Acts of 1933-4 created implied exemptions to the application

[96] *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963).

of the antitrust laws (which had not even been mentioned in the regulatory acts in question).

> the principle [is] that exchange self-regulation is to be regarded as justified in response to antitrust charges only to the extent necessary to protect the achievement of the aims of the Securities Exchange Act.[97]

Nor do we go anything like as far as *Silver* here. For while in that case there was "nothing built into the regulatory scheme which performs the antitrust function,"[98] we deal with a statutory scheme which substitutes one antitrust standard for another and does not "oust" but re-defines the antitrust function.

Even in *Philadelphia Bank* itself, this Court ruled the Clayton Act changed in a substantial manner by inference far more intricate than the direct logic used here. Since the original Clayton Act referred only to stock acquisitions and the amendment only to asset acquisitions, the total legislative pattern in terms did not reach the broad middle ground of mergers and consolidations. These, the Court scooped up *by inference,* arguing: (1) logic, (2) congressional intent, (3) legislative history, and (4) public policy.

A similar articulation here might be framed.

(1) Logic

The inapplicability of the Clayton Act to bank mergers is a logical conclusion from the use of part of its terms with other terms in a specific statutory context.

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[97] *Id.* at 361.

[98] *Id.* at 358.

(2) Congressional Intent

A congressional intent to treat banking as an industry vested with specialty is manifest in the expressions of congressional purpose culled from the debate and recited at pp. 24-9, *supra.*[99]

(3) Legislative History

The rejection of a clause which would have made Clayton 7 and Sherman 1 expressly applicable in favor of another which differed only in that single respect is ample record of a legislative history hostile to continued application of those statutes.

(4) Public Policy

Finally, while the Supreme Court in *Philadelphia Bank* could find a public policy supporting general applicability of the antitrust laws to banking, the action of the Congress in moving to overturn that decision reflects the adoption of a contrary policy. That the reversal of *Philadelphia Bank* was the overriding purpose of Congress is discussed more fully at pages 29-32, *supra.*

In several of the courts below, Justice had advanced, in support of its contention, the supposition that because the Bank Merger Act provides that the antitrust laws (defined to include Sections 1-7 of the Sherman Act; Section 1-16 of the Clayton Act; *and all other acts in pari materia*) remain applicable to bank mergers, that therefore Section 1 of the Sherman Act and Section 7 of the Clayton Act are specifically ap-

[99] As Representative Rostenkowski noted during the debates: "Congress decided long ago that the special position of banking meant that we could not rely exclusively on unregulated competition in banking." Cong. Rec., 2/8/66, p. 2354.

plicable. But applicability of the whole—i.e., the body of the Sherman and Clayton Acts—can only require applicability of any specific part, if it does so for each such part.

Thus, among the putatively applicable antitrust laws are the following:

Section 2 of the Clayton Act, the Robinson-Patman Act, which applies civil and criminal penalties in the event of price discrimination among buyers and sellers.

Section 3 of the Clayton Act, making illegal tie-in sales of commodities, which exclude bank services.

Section 6 of the Clayton Act, exempting labor unions, agricultural corporations, and horticultural associations from the application of the antitrust laws.

Section 9 of the Clayton Act, establishing embezzlement by officials of common carriers as a felony.

Section 10, placing restrictions on purchases by common carriers from firms who have an official on the carrier's board.

And several others to the same effect.

Plainly, these do not relate in any way to bank mergers. The term "the antitrust laws continue to apply" must be taken to be limited to those sections not otherwise negatived, whether by their internal logic or by conflict with the controlling terms of this particular statute.

Of course, the simple answer to plaintiff's argument is that the Bank Merger Act of 1966 is itself an antitrust law. Here Sections 5(B) and 7(B) perform the antitrust function. This is a statutory scheme which substitutes one antitrust standard for another. It does not oust but changes the antitrust function.

CONCLUSION

Fairly viewed, BMA-66 is an expresion of Congressional intent that where the duties of the bank regulatory agencies directly affect the antitrust policy of the country, initial responsibility for enforcing that policy and modifying it, if and as required by the needs of the particular industry, will rest with those agencies. The decisions of those agencies should be overturned on judicial review only on proof of legal error, or, on the merits, a showing that the decision was not supported by substantial evidence, or was arbitrary or capricious. Such is the usual legislative scheme governing regulated industries. Its application here is not the creation, but the removal, of an anomaly.

Accordingly, we urge that the decisions in the courts below should be affirmed.

Respectfully submitted,

Robert Bloom,
Chief Counsel,

Joseph J. O'Malley,
Associate Chief Counsel,

Charles H. McEnerney, Jr.,
Associate Chief Counsel,

Philip L. Roache, Jr.,
Eugene J. Metzger,
Gilbert L. Amyot,
Attorneys for the
Comptroller of the Currency

February, 1967

APPENDIX A

Thomas Ludlow Ashley
9th District, Ohio

Committees:
Banking and Currency
Merchant Marine and Fisheries

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
Washington, D. C.

FOR A.M. RELEASE
Saturday, October 16, 1965

From the office of
U.S. Rep. Thomas L. Ashley (D., Ohio)

CHAIRMAN OF HOUSE BANKING AND CURRENCY COMMITTEE ACCUSED BY REP. ASHLEY (D., OHIO) OF BLOCKING BANK MERGER BILL

U.S. Rep. Thomas Ludlow Ashley, (D., Ohio) today charged that the integrity and prestige of the House Committee on Banking and Currency have been threatened by the tactics of the Committee's Chairman, Wright Patman (D., Tex.) which Ashley said have "made a mockery of sincere efforts to develop responsible legislation relative to bank mergers." In a letter to Chairman Patman Rep. Ashley, a senior member on the Banking Committee, said that parliamentary procedure has been flaunted, the wishes of the majority of the Committee thwarted, and every dilatory and obstructionist tactic at Patman's command resorted to in his efforts to prevent the Committee from exercising its will on bank merger legislation prior to the adjournment of Congress.

THOMAS LUDLOW ASHLEY
9th District, Ohio

COMMITTEES:
Banking and Currency
Merchant Marine and Fisheries

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
Washington, D. C.
October 15, 1965

Honorable Wright Patman
Chairman
Banking and Currency Committee
House of Representatives
Washington, D. C.

Dear Mr. Chairman:

I am deeply concerned, as are most of the members of the House Committee on Banking and Currency, over recent developments which go far beyond the bank merger legislation before us and which, indeed, threaten the integrity and prestige of the Committee on which we serve.

I believe a brief chronology of events will serve to bring this serious situation into clear focus and perspective.

On June 11, 1965, the Senate passed by voice vote S. 1698, a bill to establish a procedure for the review of proposed bank mergers.

On June 14, 1965, S. 1698 was referred to the Committee on Banking and Currency.

On July 19, 1965, 26 of the 33 members of the House Banking Committee, after being informed by the Committee staff that no hearings were contemplated, directed a letter to you asking that hearings on S. 1698 be scheduled promptly.

On August 3, 1965, you announced that the Domestic Finance Subcommittee, of which you are Chairman, rather than the Subcommittee on Bank Supervision and Insurance, would hold hearings commencing on August 11 on S. 1698 and related measures.

On August 11, 1965, you issued the first of many statements, accompanied by a press release on Committee letterhead, openly critical of the bank merger legislation before your Committee.

On September 13, 1965, after more than a month of hearings on S. 1698, I introduced H. R. 11011 and identical bills were offered on the same date by 18 other members of the House Committee on Banking and Currency.

On September 17, 1965, I directed a letter to you referring to a discussion earlier that day in which you indicated your willingness to respect the majority sentiments of the Committee with regard to concluding hearings on the bank merger legislation. I informed you that I had talked to 22 members of the Committee, each of whom expressed their judgment that the current hearings should be concluded no later than September 24, and that the Subcommittee on Domestic Finance report promptly thereafter to the full Committee, in no event later than September 28.

On September 21, 1965, you replied that (1) the Subcommittee should continue to hold complete and extensive hearings on the bank merger bill and (2) that when the Subcommittee had done this and reported to the full Committee, you would "at that point certainly yield to the desires of the majority of the full Committee in this matter."

On September 24, 1965, a letter was directed to you, as Chairman of the Banking Committee, from Attorney General Katzenbach expressing the views of the Department of Justice, the Department of the Treasury, the Comptroller of the Currency and the Federal Deposit Insurance Corporation on the subject of bank merger legislation. Briefly stated, this letter expressed unanimous agreement among the above-mentioned departments and agencies that (1) past mergers should not be subject to the retroactive application of Section 1 of the Sherman Act or Section 7 of the Clayton Act and (2) that "the banking factors taken into account by the banking agencies under the Bank Merger Act of 1960 should also be taken into account by the Courts—the proposition which underlies H. R. 11011." Attorney General Katzenbach objected to forgiveness of past mergers already found by the Courts to be in violation of the anti-trust laws; the Comptroller of the Cur-

rency disagreed with the Attorney General; the Secretary of the Treasury and the Chairman of the FDIC stated that they believed the matter to be within the purview of the Department of Justice.

On September 27, 1965, you called Democratic members of the Banking Committee into caucus in an effort to reach agreement on a draft bill which you outlined to the members present. No mention was made of the contents of the Katzenbach letter which had been delivered by special messenger to the Banking and Currency Committee on September 25, 1965.

On September 29, 1965, 19 members of the Banking Committee directed a letter to you, pursuant to Section 25 of Rule XI of the Rules of the House of Representatives, requesting that, within 3 days, you call a special meeting of the Committee for the purpose of acting upon S. 1698 and related or similar bills.

On October 1, 1965, the Subcommittee on Domestic Finance met and reported by a 7-5 vote S. 1698, as amended, a bill which differed widely from the suggestions contained in the Katzenbach letter of September 24.

On October 1, 1965, you issued a Committee notice advising members that the full Committee would meet in executive session on Tuesday, October 5, to consider S. 1698, as amended and reported to the full Committee.

On October 1, 1965, I sent to you and to each member of the Committee a copy of the substitue which I said I intended to offer, representing the position on bank merger legislation agreed upon by the Department of Justice, Department of the Treasury, Comptroller of the Currency and FDIC, with one exception—my substitute would validate all mergers occurring before the Philadelphia case was decided (June 17, 1963); others would be held to the criteria set forth in my original bill, H. R. 11011, and agreed upon by the above department and agency heads. As you know, with respect to validation of mergers prior to the Philadelphia case, this is essentially the same position taken by the Subcommittee bill.

On October 4, 1965, without prior notice to or approval of the Committee membership, you announced by press release that you would "insist" that the October 5 session be open to the public as a result of "arbitrary attempts by some Committee members to rush through legislation without adequate hearings." The release stated that the Ashley bill introduces "totally new standards" on bank mergers and that my bill "would virtually eliminate the application of the anti-trust laws to bank mergers." You were perfectly well aware, of course, that the standards contained in my bill are identical with those set forth in the Bank Merger Act of 1960 and you also knew that Attorney General Katzenbach had explicitly agreed that the Courts should consider the same standards as the banking agencies, including the anti-trust laws, in determining the validity of bank mergers. You also felt impelled to repeatedly impugn the motives of members who introduced H. R. 11011 and you even went so far as to charge that this constituted a "revolt against anti-trust laws" and "an attack upon the Kennedy-Johnson Administrations."

On October 5, 1965, you directed that the executive session called for in the Committee notice of October 1 be open to the press and public. When members pointed out that Sec. 25 of Rule XI of the Rules of the House of Representatives provides for a "special meeting of the Committee," and despite a Rule of both the House and our Committee that executive sessions shall be held in private except when the Committee by majority decision decides to admit the public, you insisted that it was within your prerogatives as Chairman to hold a public session. When appeal was sought to be taken from this ruling, you dismissed it summarily, again in clear violation of the Rules of Procedure by which the Committee is meant to operate. Instead, you insisted that a motion be made by members wishing to go from public session, where pursuant to the Rules of the House and Committee we never should have been, into closed session, where we should have been in the

first place. Based upon your comments at the time, it is clear that these efforts were intended to cast members in disagreement with you in the worst possible light with the press. A reading of the transcript also reveals clearly that subsequent efforts to reach agreement on duration of debate were held to be not in order, again with no appeal from these erroneous decisions by the Chair.

On October 8, 1965, the Committee met, considered S. 1698 as amended, and then voted to recess until 10:00 Monday morning, October 11.

On October 11, 1965, consideration of S. 1698 as amended continued. At your urging, a motion was offered that the Committee recess to Thursday, October 14, because of Columbus Day (October 12) and to accommodate speaking engagements of the Chairman (October 13) but the motion was voted down. A preferential motion offered by Mr. Moorhead was then pending which would have recessed the Committee until Tuesday morning, October 12. However, when the House went into session at 12:00 Noon, the Moorhead motion could not be voted upon. Despite your earlier protestations that the next session would be scheduled at the convenience of the Committee, you thereupon adjourned the session subject to the call of the Chair.

On October 11, 1965, because of your failure to set a time and date for the next session, a second letter was directed to you pursuant to Sec. 25 of Rule XI requesting that a date be set for continuing consideration of S. 1698 as amended.

On October 13, 1965, you returned from your speaking engagement in Texas. A session of the Committee could have been scheduled for Thursday, October 14, or Friday, October 15. Instead, you issued a press release, again without prior notice to or consultation with the Committee membership, advising that a session was scheduled for 9:30 A.M. Monday, October 18, to consider a $120 million authorization bill for the Small Business Administration, after which there would be further consideration of S. 1698 as amended and related bills.

This is the sorry story, step by step, that has made a mockery of sincere efforts to develop responsible legislation relative to bank mergers. Since the Senate bill was referred to your Committee on June 11, a majority of the Committee has been obliged to insist upon each and every legislative step that has been taken. From the time you acceded to the letter of September 29, signed by 19 members, requesting a special meeting for the purpose of acting upon S. 1698 as amended, you have permitted exactly 3 sessions to take place for this purpose. Time after time parliamentary procedure has been flaunted, the wishes of a majority of the Committee thwarted, and every dilatory and obstructionist tactic at your command resorted to in your efforts to prevent the Committee from exercising its will on bank merger legislation prior to the adjournment of Congress. The record speaks for itself and it is a record of which no member of the Committee or, indeed, of the House can be proud.

Because the activities and conduct of the House Banking and Currency Committee are as much a matter of public concern as the Congress itself, I intend to release this letter to the press. I do so with very real reluctance and only in the hope that the scrutiny and judgment of the public may serve to bring about improvements in the legislative process which I believe to be absolutely essential.

Yours truly,

Thomas Ludlow Ashley, M. C.

APPENDIX B

HOUSE OF REPRESENTATIVES
Committee on Banking and Currency
Eighty-Ninth Congress
2129 Rayburn House Office Building
Washington, D.C.

Wright Patman, Tex., Chairman
Abraham J. Multer, N.Y.
William A. Barrett, Pa.
Leonor K. Sullivan, Mo.
Henry S. Reuss, Wis.
Thomas L. Ashley, Ohio
William S. Moorhead, Pa.
Robert G. Stephens, Jr., Ga.
Fernand J. St. Germain, R.I.
Henry B. Gonzalez, Tex.
Joseph G. Minish, N.J.
Charles L. Weltner, Ga.
Richard T. Hanna, Calif.
Bernard F. Grabowski, Conn.
Compton I. White, Jr., Idaho
Tom S. Gettys, S.C.
Paul H. Todd, Jr., Mich.
Richard L. Ottinger, N.Y.
Earle Cabell, Tex.
Thomas C. McGrath, Jr., N.J.
John R. Hansen, Iowa
Frank Annunzio, Ill.

William B. Widnall, N.J.
Paul A. Fino, N.Y.
Florence P. Dwyer, N.J.
Seymour Halpern, N.Y.
James Harvey, Mich.
W. E. (Bill) Brock, Tenn.
Burt L. Talcott, Calif.
Del Clawson, Calif.
Albert W. Johnson, Pa.
J. William Stanton, Ohio
Chester L. Mize, Kans.

Paul Nelson
Clerk and Staff Director

CA 4-3121, Ext. 4247

FOR IMMEDIATE RELEASE

Deem x 4247

Washington, D.C., October 21—Chairman Wright Patman today released a staff report detailing the activities of a rump session attempted by some members of the Committee last Tuesday.

The report, prepared by staff members who witnessed the rump session, showed:

1. That the regular third Tuesday meeting, under which the group claimed to be operating, had been duly cancelled by Chairman Patman;

2. That no quorum was present on any votes taken in the rump session; and

3. That the Chairman, a number of other members of the Committee, and the staff were not informed about the plans to hold the session.

The report is attached.

Att:

HOUSE OF REPRESENTATIVES
COMMITTEE ON BANKING AND CURRENCY
Eighty-Ninth Congress
2129 Rayburn House Office Building
Washington, D.C.

October 20, 1965

MEMORANDUM

TO: Chairman Patman
FROM: Paul Nelson

As directed by you I am setting forth several facts concerning the gathering of various Members of the Banking and Currency Committee in the Committee's hearing room on the morning of October 19, 1965, as I and several of the staff observed them.

First, you will recall that on Monday, October 18, I informed you of the fact that Tuesday, October 19, was the

regularly constituted meeting day of the Banking and Currency Committee. In reply you informed me that the Committee would not meet that day and as such directed a memorandum to me so stating. The full text of your memorandum to me follows:

October 18, 1965

MEMORANDUM

TO: Paul Nelson, Clerk
FROM: Wright Patman, Chairman

Rule I of the Rules of Procedure of the Committee on Banking and Currency for the 89th Congress states that the Committee shall meet at 10 a.m. on the first and third Tuesdays of each month unless cancelled by the Chairman.

The Banking and Currency Committee will not meet on October 19, 1965, which is the third Tuesday in the month.

Since it is customary only when a Committee meeting is scheduled to notify the Members, it will not be necessary for you to notify the Members that the meeting has been cancelled.

What follows is a rendition of the observations made by several members of the staff regarding the occurrence in the Committee's quarters on the morning of October 19:

1. Mrs. Deem observed while sitting at her desk in the outer office that Congressman Ottinger's Administrative Assistant, Mr. Paul A. Schusberg, came in and asked for Congressman Ottinger. Mr. Schusberg told Mrs. Deem that he was waiting for Mr. Ottinger, and that the Congressman was coming to the Committee room prior to going to his office.

Several moments later Mr. Moorhead entered the Committee's anteroom and stated to Mrs. Deem that he wanted to get something out of his desk in the Committee hearing room. Mrs. Deem went with Mr. Moorhead and asked if he wanted the lights turned on since it was quite dark in

the Committee room. Mr. Moorhead replied that he thought he could find what he needed without turning the lights on. At that point Mrs. Deem retired from the Committee room.

Mrs. Deem observed, after the passage of another five or six minutes, that there was a great deal of shuffling and noise emanating from the hearing room. She then started back into the Committee room to determine what had occurred, and at that point Mr. Annunzio came through the door from the Committee room indicating that it was dark in the hearing room. Mr. Annunzio asked if he could have the lights turned on because there were a "lot of Members in there." Mrs. Deem then proceeded to turn on the lights.

2. Several members of the staff notified me that commencing at 10 o'clock various Members of the Committee were milling outside the doors of the Committee room in the corridor and subsequently Mrs. Deem and others informed me that various Members had entered the hearing room and taken their chairs.

I then called you and you indicated that I was to inform the Members of the Committee that you were unavoidably detained for an emergency matter and that no meeting could be considered until the Chairman arrived to consider it; that the meeting for the 19th had already been cancelled which was authorized under Committee rules. I dictated a memorandum to this effect to carry into the hearing room, and prior to entering the hearing room met Mr. Annunzio. I informed Mr. Annunzio of your whereabouts and also presented him with a copy of the memorandum of October 18 from the Chairman cancelling the meeting. It is my understanding that Mr. Annunzio took this memorandum into the Committee room and presented it to Mr. Ashley who was occupying the Chair at the time.

3. At approximately 10:15 a.m. several members of the staff were sitting in the hearing room and noted that Mr. Reuss had at that time entered the Committee room and as senior majority member present assumed the Chair. Mr. Annunzio was recognized at this point by the Chair and

asked the Chairman to rule whether or not the meeting was legally constituted. Mr. Reuss stated that as the ranking member present he would first determine whether or not a valid meeting was in progress, pursuant to the Committee rules and the rules of the House. Mr. Reuss questioned several Members concerning the reason for the meeting and the circumstances under which it was called, including proper notice to all the Members. Mr. Reuss also referred to the telephone message received from Chairman Wright Patman as well as the memorandum dated October 18, 1965, as noted above, that the Committee meeting for Tuesday, October 19, had been cancelled. Mr. Reuss presiding then ruled that the gathering did not constitute a valid meeting of the Committee under the rules of the Committee and of the House, ordered the group disbanded, and withdrew from the Committee room along with Mr. Annunzio.

4. It was noted by five members of the Committee staff that at approximately 10:56 a.m. there were 15 Members of the Banking and Currency Committee within the Committee room. These Members were: Messrs. Moorhead (who was in the Chairman's chair), Ashley, Stephens, Grabowski, Gettys, Ottinger, Cabell, Widnall, Fino, Mrs. Dwyer, Messrs. Halpern, Clawson, Johnson, Stanton, and Mize.

5. The Committee staff also noted that at approximately 11:12 a.m. 15 Members of the Committee were present as follows: Messrs. Moorhead (in the Chairman's chair), Ashley, Stephens, Grabowski, Gettys, Ottinger, Cabell, Widnall, Fino, Mrs. Dwyer, Messrs. Halpern, Clawson, Johnson, Stanton, and Mize.

At 11:15 a.m., Mr. Halpern left the room. At 11:15 a.m., Mr. Moorhead (from the Chairman's chair) moved under the "procedures previously adopted" the question regarding the Ottinger amendment. The amendment, according to Mr. Moorhead, carried by voice vote. At approximately 11:16 a.m., Mr. Moorhead moved the question on the Ashley

substitute as amended by the Ottinger amendment. According to Mr. Moorhead it carried unanimously by voice vote. The vote was announced at approximately 11:19 a.m.

Mr. Stephens asked that the record show that the Committee staff members Nelson, Morse, Prins and the microphone operator (G. McMurray) were present. At no time were the staff members able to count more than 16 Members in the Committee room at any one time. The staff was informed by Mr. Multer, Mrs. Sullivan, Messrs. Reuss, Gonzalez, Minish, and Todd that none of them was informed in advance of the purported meeting. It is likely that several other Members also received no notice.

During the course of the proceedings, the staff noted that, on every vote taken, proxies executed by absent Members were voted. Under rules of the Committee, proxies cannot be counted as part of a quorum.

6. At approximately 11:40 it was noted by members of the Committee staff that Chairman Patman entered the room and assumed his seat. The Chairman ruled that the gathering did not constitute a duly called and assembled meeting of the Committee, that there was no record of the gathering, that it was strictly informal, but invited the Members to freely discuss any matter they wished. Mr. Todd made the point of order that a quorum was not present. The Chairman responded that there was not a valid Committee meeting in the first place.

7. It should also be reported that the Ward & Paul reporter who appeared at this gathering informed Committee staff (as was subsequently verified by Mr. Ward, of Ward & Paul) that Ward & Paul's office had been called the previous day to have a reporter present in Mr. Moorhead's office to transcribe a "technical hearing" and that Mr. Moorhead would pay for the services. The reporter informed Committee staff that he arrived at Mr. Moorhead's office at 9:30 and Mr. Moorhead took him to the Committee hearing room whence he began by direction of Mr. Moorhead to transcribe the minutes of the gathering.

APPENDIX C

HOUSE COMMITTEE ON BANKING AND CURRENCY

(Mr. ASHLEY (at the requests of Mr. DYAL) was granted permission to extend his remarks at this point in the RECORD and to include extraneous matter.)

Mr. ASHLEY. Mr. Speaker, under a special order on Tuesday, October 19, the gentleman from Texas [Mr. PATMAN] took the floor to denounce what he characterized as a "rump session" of the House Committee on Banking and Currency. I want to take just a few moments to set the record straight.

Rule I of the rules of the Banking Committee provides that the committee shall meet every first and third Tuesday of the month unless the meeting is cancelled by the chairman. When Chairman PATMAN did not cancel last Tuesday's meeting, the committee met and, in the absence of the chairman and pursuant to clause 3 of rule X of the Rules of the House of Representatives—which provide that in the temporary absence of the chairman the next ranking member shall preside—I called the meeting to order at 10:07 a.m. on Tuesday, October 19.

The committee first adopted a detailed procedural resolution offered by our colleague, the gentleman from Pennsylvania. [Mr. MOORHEAD]. Subsequently, when the gentleman from Wisconsin [Mr. REUSS] entered the meeting, he was offered and took the chair as ranking member, again in accordance with clause 3 of rule X. When the gentleman from Wisconsin [Mr. REUSS] ruled that the meeting was not duly constituted, the ruling was appealed and the members of the committee voted overwhelmingly to sustain the appeal.

The committee then voted down an amendment which had been offered at a previous meeting by the gentleman from

New York [Mr. Multer]. I then offered a substitute to the bank merger bill that was reported by the Domestic Finance Subcommittee on October 1, 1965. An amendment was offered by the gentleman from New York [Mr. Ottinger] and, when this was accepted unanimously, the Ashley substitute was adopted also unanimously.

The gentleman from South Carolina [Mr. Gettys] then moved to direct the chairman or a member in favor of the bill to submit a report of the committee to the House of Representatives and a second motion to direct the members supporting the motion to take all necessary and desirable parliamentary steps to insure early and favorable consideration by the House. These latter two motions carried by a vote of 17 to 1 with the chairman of the full committee, the gentleman from Texas [Mr. Patman], present but not voting. Two of the votes in favor were cast by proxies held by the gentleman from New Jersey [Mr. Widnall].

When the House convened at noon on October 19, I obtained unanimous consent to have until midnight that night to file the report of the committee.

In an effort to support his charge that this meeting was illegal, the gentleman from Texas [Mr. Patman] has stated publicly that first, the regular meeting of the committee had been canceled; and second, that a quorum was never present at the meeting.

With respect to the alleged cancellation of the meeting, the gentleman from Texas [Mr. Patman] relies upon his memorandum to Paul Nelson, clerk of the committee, dated October 18, which reads as follows:

Rule I of the Rules of Procedure of the Committee on Banking and Currency for the 89th Congress states that the committee shall meet at 10 a.m. on the first and third Tuesday of each month unless cancelled by the Chairman.

The Banking and Currency Committee will not meet on October 19, 1965, which is the third Tuesday in the month.

Since it is customary only when a committee meeting is scheduled to notify the members, it will not be necessary for

you to notify the members that the meeting has been canceled.

The last sentence, of course, is all important. Clearly, what the gentleman from Texas [Mr. PATMAN] contends is that the cancellation provided for in rule I of the committee's rules can be accomplished by the chairman's not taking action to schedule a meeting, rather than by affirmative action notifying the members that a meeting will not take place.

We submit that this interpretation is totally unsupported by accepted legislative construction.

With respect to the presence of a quorum, 16 members of the committee have affixed their signatures to tally slips used to record the votes on the two motions made by the gentleman from South Carolina [Mr. GETTYS]. In addition, at that time the gentleman from Texas [Mr. PATMAN] himself was present and in the chair but did not vote. He claims that although he was physically present, he was not present in any official capacity and, therefore, cannot be counted for purposes of a quorum.

One cannot help but be reminded of the nursery rhyme which goes:

> Yesterday upon the stair
> I saw a man who wasn't there;
> He wasn't there again today,
> Oh, how I wish he'd go away.

In all seriousness, Mr. Speaker, we submit that the committee meeting on October 19 was in strict conformance with rule I of the committee's rules, that a quorum was present and that S. 1698 with amendments was passed and properly reported to the House.

In order that the House may be fully informed, I believe the following brief chronology of events will prove helpful:

On June 11, 1965, the Senate passed by voice vote S. 1698, a bill to establish a procedure for the review of proposed bank mergers.

On June 14, 1965, S. 1698 was referred to the Committee on Banking and Currency.

On July 19, 1965, 26 of the 33 members of the House Banking Committee, after being informed by the committee staff that no hearings were contemplated, directed a letter to Chairman PATMAN asking that hearings on S. 1698 be scheduled promptly.

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On August 11, 1965, the gentleman from Texas [Mr. PATMAN] issued the first of many statements, accompanied by a press release on committee letterhead, openly critical of the bank merger legislation before his committee.

On September 13, 1965, after more than a month of hearings on S. 1698, I introduced H.R. 11011 and identical bills were offered on the same date by 18 other Members of the House Committee on Banking and Currency.

On September 17, 1965, I directed a letter to the gentleman from Texas, Chairman PATMAN, referring to a discussion earlier that day in which he indicated his willingness to respect the majority sentiments of the committee with regard to concluding hearings on the bank merger legislation. I informed the gentleman from Texas [Mr. PATMAN] that I had talked to 22 members of the committee, each of whom expressed their judgment that the current hearings should be concluded no later than September 24, and that the Subcommittee on Domestic Finance report promptly thereafter to the full committee, in no event later than September 28.

On September 21, 1965, the gentleman from Texas, Chairman PATMAN, replied that first, the subcommittee should continue to hold complete and extensive hearings on the bank merger bill; and, second, that when the subcommittee

had done this and reported to the full committee, he would "at that point certainly yield to the desires of the majority of the full committee in this matter."

On September 24, 1965, a letter was directed to the gentleman from Texas [Mr. Patman], as chairman of the Banking Committee, from Attorney General Katzenbach expressing the views of the Department of Justice, the Department of the Treasury, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation on the subject of bank merger legislation. Briefly stated, this letter expressed unanimous agreement among the above-mentioned departments and agencies that, first, past mergers should not be subject to the retroactive application of section 1 of the Sherman Act or section 7 of the Clayton Act, and second, that "the banking factors taken into account by the banking agencies under the Bank Merger Act of 1960 should also be taken into account by the courts—the proposition which underlies H.R. 11011." Attorney General Katzenbach objected to forgiveness of past mergers already found by the courts to be in violation of the antitrust laws; the Comptroller of the Currency disagreed with the Attorney General; the Secretary of the Treasury and the Chairman of the FDIC stated that they believed the matter to be within the purview of the Department of Justice.

On September 27, 1965, Chairman Patman called Democratic members of the Banking Committee into caucus in an effort to reach agreement on a draft bill which he outlined to the members present. No mention was made of the contents of the Katzenbach letter which had been delivered by special messenger to the Banking and Currency Committee on September 25, 1965.

On September 29, 1965, 19 members of the Banking Committee directed a letter to the gentleman from Texas, Chairman Patman, pursuant to section 25 of rule XI of the Rules of the House of Representatives, requesting that, within 3 days, he call a special meeting of the committee for the purpose of acting upon S. 1698 and related or similar bills.

On October 1, 1965, the Subcommittee on Domestic Finance met and reported by a 7-to-5 vote S. 1698, as amended, a bill which differed widely from the suggestions contained in the Katzenbach letter of September 24.

On October 1, 1965, the gentleman from Texas, Chairman PATMAN, issued a committee notice advising members that the full committee would meet in executive session on Tuesday, October 5, to consider S. 1698, as amended and reported to the full committee.

On October 1, 1965, I sent to the gentleman from Texas, Chairman PATMAN, and to each member of the committee a copy of the substitute which I said I intended to offer, representing the position on bank merger legislation agreed upon by the Department of Justice, Department of the Treasury, Comptroller of the Currency and FDIC, with one exception—my substitute would validate all mergers occurring before the Philadelphia case was decided—June 17, 1963; others would be held to the criteria set forth in my original bill, H.R. 11011, and agreed upon by the above department and agency heads. With respect to validation of mergers prior to the Philadelphia case, this is essentially the same position taken by the gentleman from Texas [Mr. PATMAN] subcommittee bill.

On October 4, 1965, without prior notice to or approval of the committee membership, the gentleman from Texas, Chairman PATMAN, announced by press release that he would "insist" that the October 5 session be open to the public as a result of "arbitrary attempts by some committee members to rush through legislation without adequate hearings." The release stated that the Ashley bill introduces "totally new standards" on bank mergers and that my bill "would virtually eliminate the application of the antitrust laws to bank mergers." Mr. PATMAN was perfectly well aware, of course, that the standards contained in my bill are identical with those set forth in the Bank Merger Act of 1960 and you also knew that Attorney General Katzenbach had explicitly agreed that the courts should consider

the same standards as the banking agencies, including the antitrust laws, in determining the validity of bank mergers. Mr. PATMAN also felt impelled to repeatedly impugn the motives of members who introduced H.R. 11011 and he even went so far as to charge that this constituted a "revolt against antitrust laws" and "an attack upon the Kennedy-Johnson administrations."

On October 5, 1965, the gentleman from Texas, Chairman PATMAN, directed that the executive session called for in the committee notice of October 1 be open to the press and public. When members pointed out that section 25 of rule XI of the Rules of the House of Representatives provides for a "special meeting of the committee," and despite a rule of both the House and our committee that executive sessions shall be held in private except when the committee by majority decision decides to admit the public, the gentleman from Texas [Mr. PATMAN] insisted that it was within his prerogatives as chairman to hold a public session. When appeal was sought to be taken from this ruling, the gentleman from Texas, Chairman PATMAN, dismissed it summarily, again in clear violation of the Rules of Procedure by which the committee is meant to operate. Instead, he insisted that a motion be made by members wishing to go from public session, where pursuant to the Rules of the House and committee we never should have been, into closed session, where we should have been in the first place. Based upon the chairman's comments at the time, it is clear that these efforts were intended to cast members in disagreement with him in the worst possible light with the press. A reading of the transcript also reveals clearly that subsequent efforts to reach agreement on duration of debate were held to be not in order, again with no appeal from these erroneous decisions by the Chair.

On October 8, 1965, the committee met, considered S. 1698 as amended, and then voted to recess until 10 Monday morning, October 11.

On October 11, 1965, consideration of S. 1698 as amended continued. At the gentleman from Texas' [Mr. PATMAN]

urging, a motion was offered that the committee recess to Thursday, October 14, because of Columbus Day—October 12—and to accommodate speaking engagements of the chairman—October 13—but the motion was voted down. A preferential motion offered by the gentleman from Pennsylvania [Mr. MOORHEAD] was then pending which would have recessed the committee until Tuesday morning, October 12. However, when the House went into session at 12 noon, the Moorhead motion could not be voted upon. Despite the chairman's earlier protestations that the next session would be scheduled at the convenience of the committee, he thereupon adjourned the session subject to the call of the Chair.

On October 11, 1965, because of Chairman PATMAN's failure to set a time and date for the next session, a second letter was directed to him pursuant to section 25 of rule XI requesting that a date be set for continuing consideration of S. 1698 as amended.

On October 13, 1965, the gentleman from Texas, Chairman PATMAN, returned from his speaking engagement in Texas. A session of the committee could have been scheduled for Thursday, October 14, or Friday, October 15. Instead, Chairman PATMAN called a meeting for 10:30 a.m. on October 18.

On October 18, 1965, Chairman PATMAN, the gentleman from Texas, called the meeting to order and, establishing that a quorum was not then present, he adjourned the committee subject to the call of the Chair. Within a matter of minutes, additional members arrived and a quorum would have been available but Mr. PATMAN refused to reconvene the meeting.

These are the events, Mr. Speaker, which led to the committee session on October 19. From the very beginning the members of the committee who repeatedly have urged legislative action in the bank-merger field have done so because of their honest conviction that it is highly important to the entire financial community that the procedures be clarified which govern approval of proposed bank mergers.

Far more important than the legislative issue at hand is the question of whether majority rule is to be respected in the House of Representatives or, alternatively, whether a House committee is to be allowed to be treated by its chairman as his own private domain for whatever purposes he may choose. In my opinion, Mr. Speaker, the action by the House Members last Tuesday represents a forceful response both to this question and to the issue of bank-merger legislation.

APPENDIX D

There follows a physical comparison of the enacted bill with the Ashley-Ottinger Bill passed by the House Banking Committee on October 19, 1965. Where the text of the two bills is identical, normal printed type is utilized for both bills. Where additional text is found in the enacted bill, it is underlined. Where the language but not the sense of the Ashley-Ottinger Bill was changed in the Bank Merger Act, the two versions are italicized. Since no portion of the Ashley-Ottinger Bill was omitted, it was unnecessary to set up a fourth classification for deletions.

BANK MERGER ACT OF 1966	ASHLEY-OTTINGER BILL S-1698 AS AMENDED 10/19/65
(c)(1) Except with the prior written approval of the responsible agency, which shall in every case referred to in this paragraph be the Corporation, no insured bank shall—	(c)(1) Except with the prior written approval of the responsible agency, which shall in every case referred to in this paragraph be the Corporation, no insured bank shall—
(A) merge or consolidate with any noninsured bank or institution;	(A) merge or consolidate with any noninsured bank or institution;
(B) assume liability to pay any deposits made in, or similar liabilities of, any noninsured bank or institution;	(B) assume liability to pay any deposits made in, or similar liabilities of, any noninsured bank or institution;
(C) transfer assets to any noninsured bank or institution in consideration of the assumption of liabilities for any portion of the deposits made in such insured bank.	(C) transfer assets to any noninsured bank or institution in consideration of the assumption of liabilities for any portion of the deposits made in such insured bank.
(2) No insured bank shall merge or consolidate with any other insured bank or, either directly or indirectly, acquire the assets of, or assume liability to pay any deposits made in, any other insured bank except with the prior written approval of the responsible agency, which shall be—	(2) No insured bank shall merge or consolidate with any other insured bank or, either directly or indirectly, acquire the assets of, or assume liability to pay any deposits made in, any other insured bank except with the prior written approval of the responsible agency, which shall be—
(A) the Comptroller of the Currency if the acquiring, assuming, or resulting bank is to be a national bank or a District bank;	(A) the Comptroller of the Currency if the acquiring, assuming, or resulting bank is to be a national bank or a District bank;

BANK MERGER ACT OF 1966

(B) the Board of Governors of the Federal Reserve System if the acquiring, assuming, or resulting bank is to be a State member bank (except a District bank);

(C) the Corporation if the acquiring, assuming or resulting bank is to be a nonmember insured bank (except a District bank).

(3) Notice of any proposed transaction for which approval is required under paragraph (1) or (2) (referred to hereafter in this subsection as a "merger transaction") shall, unless the responsible agency finds that it must act immediately in order to prevent the probable failure of one of the banks involved, be published—

(A) prior to the granting of approval of such transaction;

(B) in a form approved by the responsible agency;

(C) at appropriate intervals during a period at least as long as the period allowed for furnishing reports under paragraph (4) of this subsection, and

(D) in a newspaper of general circulation in the com-

ASHLEY-OTTINGER BILL S-1698 AS AMENDED 10/19/65

(B) the Board of Governors of the Federal Reserve System if the acquiring, assuming, or resulting bank is to be a State member bank (except a District bank);

(C) the Corporation if the acquiring, assuming or resulting bank is to be a nonmember insured bank (except a District bank).

(3) Notice of any proposed transaction for which approval is required under paragraph (1) or (2) (referred to hereafter in this subsection as a "merger transaction") shall, unless the responsible agency finds that it must act immediately in order to prevent the probable failure of one of the banks involved, be published—

(A) prior to the granting of approval of such transaction;

(B) in a form approved by the responsible agency;

(C) at appropriate intervals during a period at least as long as the period allowed for furnishing reports under paragraph (4) of this subsection, and

(D) in a newspaper of general circulation in the com-

Bank Merger Act of 1966

munity or communities where the main offices of the banks involved are located, or, if there is no such newspaper in any such community, then in the newspaper of general circulation published nearest thereto.

(4) In the interests of uniform standards, before acting on any application for approval of a merger transaction, the responsible agency, unless it finds that it must act immediately in order to prevent the probable failure of one of the banks involved, shall request reports on the competitive factors involved from the Attorney General and the other two banking agencies referred to in this subsection. The reports shall be furnished within thirty calendar days of the date on which they are requested, or within ten calendar days of such date if the requesting agency advises the Attorney General and the other two banking agencies that an emergency exists requiring expeditious action.

Ashley-Ottinger Bill S-1698 As Amended 10/19/65

munity or communities where the main offices of the banks involved are located, or, if there is no such newspaper in any such community, then in the newspaper of general circulation published nearest thereto.

(4) In the interests of uniform standards, before acting on any application for approval of a merger transaction, the responsible agency, unless it finds that it must act immediately in order to prevent the probable failure of one of the banks involved, shall request reports on the competitive factors involved from the Attorney General and the other two banking agencies referred to in this subsection. The reports shall be furnished within thirty calendar days of the date on which they are requested, or within ten calendar days of such date if the requesting agency advises the Attorney General and the other two banking agencies that an emergency exists requiring expeditious action.

Bank Merger Act of 1966	Ashley-Ottinger Bill S-1698 As Amended 10/19/65
(5) The responsible agency shall not approve—	
(A)[1] any proposed merger transaction which would result in a monopoly or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or	

[1] The total redundancy of this clause may be observed from the preservation of the violation of Section 2 of the Sherman Act already present in subsection 7(C), Section 2(a) and Section 2(b) of the Ashley-Ottinger Bill.

Bank Merger Act of 1966	Ashley-Ottinger Bill S-1698 As Amended 10/19/65
(B) Any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community.	Any merger transaction under this subsection unless it finds that such transaction will not violate the antitrust laws, except that in considering the application of the antitrust laws to merger transactions, the responsible agency, the Attorney General, and any court reviewing the legality of such transaction shall take into account the effect on the public interest and the community to be served of the following factors: (A) The financial history and condition of each of the banks involved, (B) The adequacy of its capital structure, (C) Its future earnings prospects, (D) The general character of its management, (E) The convenience and needs of the community to be served, and (F) Whether or not its corporate powers are consistent with the purposes of this act.
In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.	A merger transaction which tends to lessen competition may be approved where the probable adverse competitive effect thereof is clearly outweighed in the public interest by the probable effect of such transaction in meeting the convenience and needs of the community to be served.

Bank Merger Act of 1966

(6) The responsible agency shall immediately notify the Attorney General of any approval by it pursuant to this subsection of a proposed merger transaction. If the agency has found that it must act immediately to prevent the probable failure of one of the banks involved and reports on the competitive factors have been dispensed with, the transaction may be consummated immediately upon approval by the agency. If the agency has advised the Attorney General and the other two banking agencies of the existence of an emergency requiring expeditious action and has requested reports on the competitive factors within ten days, the transaction may not be consummated before the fifth calendar day after the date of approval by the agency. In all other cases, the transaction may not be consummated before the thirtieth calendar day after the date of approval by the agency.

(7) (A) Any action brought under the antitrust laws arising out of a merger transaction shall be commenced prior to the earliest time under paragraph (6) at which a merger transaction approved under

Ashley-Ottinger Bill S-1698 As Amended 10/19/65

(6) The responsible agency shall immediately notify the Attorney General of any approval by it pursuant to this subsection of a proposed merger transaction. If the agency has found that it must act immediately to prevent the probable failure of one of the banks involved and reports on the competitive factors have been dispensed with, the transaction may be consummated immediately upon approval by the agency. If the agency has advised the Attorney General and the other two banking agencies of the existence of an emergency requiring expeditious action and has requested reports on the competitive factors within ten days, the transaction may not be consummated before the fifth calendar day after the date of approval by the agency. In all other cases, the transaction may not be consummated before the thirtieth calendar day after the date of approval by the agency.

(7) Any action brought under the antitrust laws arising out of a merger transaction shall be commenced prior to the earliest time under paragraph (6) at which a merger transaction approved under

Bank Merger Act of 1966	Ashley-Ottinger Bill S-1698 As Amended 10/19/65
paragraph (5) might be consummated. The commencement of such an action shall stay the effectiveness of the agency's approval unless the court shall other wise specifically order. In any such action, the court shall review de novo the issues presented.	paragraph (5) might be consummated. The commencement of such an action shall stay the effectiveness of the agency's approval unless the court shall otherwise specifically order.
(B) In any judicial proceeding attacking a merger transaction approved under paragraph (5) on the ground that the merger transaction alone and of itself constituted a violation of any antitrust laws other than Section 2 of the Act of July 2, 1890 (Section 2 of the Sherman Antitrust Act, 15 U.S.C. 2), the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5).	In adjudicating the propriety of any merger transaction, the Court shall apply the same rule of law that paragraph (5) directs the responsible agencies to apply when initially passing on the question.
(C) Upon the consummation of a merger transaction in compliance with this subsection and after the termination of any antitrust litigation commenced within the period prescribed in this paragraph, or upon the termination of such period if no such litigation is commenced therein, the transaction may not thereafter be attacked in any judicial pro-	Upon the consummation of a merger transaction in compliance with this subsection and after the termination of any antitrust litigation commenced within the period prescribed in this paragraph, or upon the termination of such period if no such litigation is commenced therein, the transaction may not thereafter be attacked in any judicial pro-

Bank Merger Act of 1966	Ashley-Ottinger Bill S-1698 As Amended 10/19/65
ceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2), but nothing in this subsection shall exempt any bank resulting from a merger transaction from complying with the antitrust laws after the consummation of such transaction.	ceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2), but nothing in this subsection shall exempt any bank resulting from a merger transaction from complying with the antitrust laws after the consummation of such transaction.
(D) In any action brought under the antitrust laws arising out of a merger transaction approved by a Federal supervisory agency pursuant to this subsection, such agency, and any State banking supervisory agency having jurisdiction within the State involved, may appear as a party of its own motion and as of right, and be represented by its counsel.[4]	
(8) For the purposes of this subsection, the term "antitrust laws" means the Act of July 2, 1890 (the Sherman Antitrust Act, 15 U.S.C. 1-7), the Act of October 15, 1914 (the Clayton Act, 15 U.S.C. 12-27), and any other Acts in pari materia.	(8) For the purposes of this subsection, the term "antitrust laws" means the Act of July 2, 1890 (the Sherman Antitrust Act, 15 U.S.C. 1-7), the Act of October 15, 1914 (the Clayton Act, 15 U.S.C. 12-27), and any other Acts in pari materia.

[4] This Subsection was not among the Reuss proposals.

Bank Merger Act of 1966	Ashley-Ottinger Bill S-1698 As Amended 10/19/65
(9) Each of the responsible agencies shall include in its annual report to the Congress a description of each merger transaction approved by it during the period covered by the report, along with the following information:	(9) Each of the responsible agencies shall include in its annual report to the Congress a description of each merger transaction approved by it during the period covered by the report, along with the following information:
(A) the name and total resources of each bank involved;	(A) the name and total resources of each bank involved;
(B) whether a report was submitted by the Attorney General under paragraph (4), and, if so, a summary by the Attorney General of the substance of such report; and	(B) whether a report was submitted by the Attorney General under paragraph (4), and, if so, a summary by the Attorney General of the substance of such report; and
(C) a statement by the responsible agency of the basis for its approval.	(C) a statement by the responsible agency of the basis for its approval.
(b) Section 18 of such Act is further amended by adding at the end thereof the following new subsection:	(b) Section 18 of such Act is further amended by adding at the end thereof the following new subsection:
(i) (1) No insured State nonmember bank (except a District bank) shall, without the prior consent of the Corporation, reduce the amount or retire any part of its common or preferred capital stock, or retire any part of its capital notes or debentures.	(i) (1) No insured State nonmember bank (except a District bank) shall, without the prior consent of the Corporation, reduce the amount or retire any part of its common or preferred capital stock, or retire any part of its capital notes or debentures.
(2) No insured bank shall convert into an insurance State	(2) No insured bank shall convert into an insurance State

BANK MERGER ACT OF 1966

bank if its capital stock or its surplus will be less than the capital stock or surplus, respectively, of the converting bank at the time of the shareholder's meeting approving such conversion, without the prior written consent of—

(A) the Comptroller of the Currency if the resulting bank is to be a District bank;

(B) the Board of Governors of the Federal Reserve System if the resulting bank is to be a State member bank (except a District bank).

(C) the Corporation if the resulting bank is to be a State nonmember insured bank (except a District bank).

(3) Without the prior written consent of the Corporation, no insured bank shall convert into a noninsured bank or institution.

(4) In granting or withholding consent under this subsection, the responsible agency shall consider—

(A) the financial history and condition of the bank;

(B) the adequacy of its capital structure;

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bank if its capital stock or its surplus will be less than the capital stock or surplus, respectively, of the converting bank at the time of the shareholder's meeting approving such conversion, without the prior written consent of—

(A) the Comptroller of the Currency if the resulting bank is to be a District bank;

(B) the Board of Governors of the Federal Reserve System if the resulting bank is to be a State member bank (except a District bank).

(C) the Corporation if the resulting bank is to be a State nonmember insured bank (except a District bank).

(3) Without the prior written consent of the Corporation, no insured bank shall convert into a noninsured bank or institution.

(4) In granting or withholding consent under this subsection, the responsible agency shall consider—

(A) the financial history and condition of the bank;

(B) the adequacy of its capital structure;

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(C) its future earnings prospects;

(D) the general character of its management;

(E) the convenience and needs of the community to be served; and

(F) whether or not its corporate powers are consistent with the purposes of this Act.

Sec. 2(a) Any merger, consolidation, acquisition of assets, or assumption of liabilities involving an insured bank which was consummated prior to June 17, 1963, the bank resulting from which has not been dissolved or divided and has not effected a sale or distribution of assets and has not taken any other similar action pursuant to a final judgment under the antitrust laws prior to the enactment of this Act, shall be conclusively presumed to have not been in violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2).

(b) No merger, consolidation, acquisition of assets, or assumption of liabilities involving an insured bank which was consummated after June 16,

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(C) its future earnings prospects;

(D) the general character of its management;

(E) the convenience and needs of the community to be served; and

(F) whether or not its corporate powers are consistent with the purposes of this Act.

Sec. 2(a) Any merger, consolidation, acquisition of assets, or assumption of liabilities involving an insured bank which was consummated prior to June 17, 1963, the bank resulting from which has not been dissolved or divided and has not effected a sale or distribution of assets and has not taken any other similar action pursuant to a final judgment under the antitrust laws prior to the enactment of this Act, shall be conclusively presumed to have not been in violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2).

(b) No merger, consolidation, acquisition of assets, or assumption of liabilities involving an insured bank which was consummated after June 16,

Bank Merger Act of 1966	Ashley-Ottinger Bill S-1698 As Amended 10/19/65
1963, and prior to the date of enactment of this Act and as to which no litigation was initiated by the Attorney General prior to the date of enactment of this Act may be attacked after such date in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2).	1963, and prior to the date of enactment of this Act and as to which no litigation was initiated by the Attorney General prior to the date of enactment of this Act may be attacked after such date in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2).
(c) Any court having pending before it on the date of enactment of this Act any litigation initiated under the antitrust laws by the Attorney General after June 16, 1963, with respect to the merger, consolidation, acquisition of assets, or assumption of liabilities of an insured bank consummated after June 16, 1963, shall apply the substantive rule of law set forth in section 18(c)(5), supra, of the Federal Deposit Insurance Act, as amended by this Act.	(c) Any court having pending before it on the date of enactment of this Act any litigation initiated under the antitrust laws by the Attorney General after June 16, 1963, with respect to the merger, consolidation, acquisition of assets, or assumption of liabilities of an insured bank consummated after June 16, 1963, shall apply the substantive rule of law set forth in section 18(c)(5), supra, of the Federal Deposit Insurance Act, as amended by this Act.
(d) For the purposes of this section, the term "antitrust laws" means the Act of July 2, 1890 (the Sherman Antitrust Act, 15 U.S.C. 1-7), the Act of October 15, 1914 (the Clayton	(d) For the purposes of this section, the term "antitrust laws" means the Act of July 2, 1890 (the Sherman Antitrust Act, 15 U.S.C. 1-7), the Act of October 15, 1914 (the Clayton

Bank Merger Act of 1966	Ashley-Ottinger Bill S-1698 As Amended 10/19/65
Act, 15 U.S.C. 12-27), and any other Acts in pari materia.	Act, 15 U.S.C. 12-27), and any other Acts in pari materia.
Sec. 3. Any application for approval of a merger transaction (as the term "merger transaction" is used in section 18(c) of the Federal Deposit Insurance Act) which was made before the date of enactment of this Act, but was withdrawn or abandoned as a result of any objections made or any suit brought by the Attorney General, may be reinstituted and shall be acted upon in accordance with the provisions of this Act without prejudice by such withdrawal, abandonment, objections, or judicial proceedings.[5]	

[5] This section was also not included among the Reuss proposals.

APPENDIX E

[Filed Oct. 6, 1966]

Civil Action No. 41,808

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff

vs.

CROCKER-ANGLO NATIONAL BANK, CITIZENS NATIONAL BANK, and TRANSAMERICA CORPORATION, Defendants

Opinion and Order

Before POPE, Circuit Judge, SWEIGERT and ZIRPOLI, District Judges.

POPE, Circuit Judge.

On May 13, 1963, some 34 days prior to the decision of the United States Supreme Court in United States v. Philadelphia Nat. Bank, 374 U.S. 321, (June 17, 1963), the Crocker-Anglo National Bank of San Francisco and Citizens National Bank of Los Angeles applied to the Comptroller of the Currency for permission to merge, under the charter of the former, with the title "Crocker-Citizens National Bank". After notice and public hearing held July 30 and 31, 1963, and receipt of some 1605 pages of testimony and exhibits, the Comptroller, on September 30, 1963, made a decision approving the proposed merger, subject to certain named conditions, based on his findings including the finding that the proposed merger would promote the public interest. The approval was to be effective on or after November 1, 1963. On October 8, 1963, this suit was filed attacking the proposed merger as unlawful under § 7 of the Clayton Act, (15 USC § 18) and § 1 of the Sherman Act, (15 USC § 1). A certificate under the Expediting Act

(15 USC § 28) was filed and pursuant thereto a three-judge court was named and assembled for the purpose of hearing the cause. The Government's application for a preliminary injunction was denied (United States v. Crocker Anglo Nat. Bank, 223 F. Supp. 849) and after completion of extensive pretrial proceedings and the making of a pretrial order the cause came on for trial on the merits. The trial began June 1, 1965 and the taking of testimony was concluded on June 18, 1965 with orders fixing the time for filing of briefs and proposed findings by the parties.

While the court was thus in the process of hearing testimony, on June 11, 1965 the Senate passed, with no opposing vote, its S. 1698, a bill under whose provisions, if enacted, this case would have become moot, for, as stated in the report accompanying the bill, the bill "would free the banks involved in such suits from further proceedings under the anti-trust laws." Whether it was because of their knowledge of the pendency of this legislation or otherwise, counsel by stipulation postponed the final filing of briefs and proposed findings until shortly before the passage of this proposed legislation, as amended in the House on February 9, 1966. The enactment, designated Public Law 89-356, 80 Stat. 7, was signed by the President on February 21, 1966.

The court was thus confronted with a somewhat extraordinary situation in which the law applicable to the case was changed after the testimony had been received and the cause submitted for decision. The measure, as finally enacted, made specific reference to this and other cases similarly situated in § 2(c) thereof which provides as follows: "Any court having pending before it on or after the date of enactment of this Act any litigation initiated under the antitrust laws by the Attorney General after June 16, 1963, with respect to the merger, consolidation, acquisition of assets, or assumption of liabilities of an insured bank consummated after June 16, 1963, shall apply the substantive rule of law set forth in section 18(c)(5) of the Federal

Deposit Insurance Act, as amended by this Act."[1] The so-called "substantive rule of law set forth in § 18(c)(5)" is stated in the Act as follows: "(5) The responsible agency shall not approve—

(A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions and the convenience and needs of the community to be served."

That language refers to the tests to be applied, in a case of this type, by the Comptroller of the Currency in passing upon an application for approval of a proposed bank merger. Not only did §2(c), quoted above, specifically direct that this court, in respect to this case, "shall apply the substantive rule of law set forth in §18(c)(5) but §18(c)(7)(B) provided as follows: "In any judicial proceeding attacking

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[1] It was noted in the congressional debates that this section referred to three so-called "post Philadelphia cases—in Nashville, San Francisco and St. Louis—where mergers were consummated after that [Philadelphia] decision." This is the San Francisco case there referred to. The Philadelphia case referred to is United States v. Philadelphia National Bank, 374 U.S. 321. In that connection reference was also made to United States v. First Nat. Bank, 376 U.S. 665.

a merger transaction approved under paragraph (5) on the ground that the merger transaction alone and of itself constituted a violation of any antitrust laws other than §2 of the Act of July 2, 1890 (§2 of the Sherman Antitrust Act, 15 U.S.C. 2), the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5)."

After a special hearing conducted for that purpose evidence was received and the parties were granted time within which to file further briefs and memoranda expounding their views as to the action which the court should take in the light of the entire testimony and in view of the new enactment.

It is the Government's view that the new statute made no substantial change in the law or standards to be applied in passing upon the issues here presented. The Government puts it thus: "It is, of course, the essential position of the Government . . . that the 1966 amendment to the Bank Merger Act (P.L. 89-356; 80 Stat. 7) has not resulted in substantial change in substantive antitrust law or in the standards used by the courts in determining the legality of bank mergers."

The new enactment does pose some difficult questions which we shall note hereafter. But we find no difficulty in concluding that the new enactment made substantial changes in the substantive law and in the standards to be applied in this case. Not only the language of the enactment but its legislative history is very compelling on this point. As we have noted, both §2(c) and §18(c)(7)(B), quoted above, specifically direct the court in this situation to apply the new standards of this Act. (The latter refers to the standards "directed to apply under paragraph 5" and §2(c) and refers to these as "the substantive rule of law," set forth in that section.) It would be a bit startling to assume that in making this enactment, over which the congressional committees struggled long and hard, the Congress had turned up with nothing of substance, or had

accomplished no change in respect to the law applicable for testing the validity of bank mergers.

The legislative history of the Act most emphatically contradicts the position now taken by the Government. The Senate Committee report, which accompanied the introduction of the bill in the Senate, took note of what Congress had contemplated would be the result of the Bank Merger Act of 1960. The Committee stated: "At that time it was clearly expected that the decision of the responsible Federal banking authority, based on its own investigation and on reports on competitive factors from the other two banking agencies and from the Department of Justice, would be final and conclusive. The Attorney General's report was expected to be advisory only." The report states that the uncertainty created by the situation resulting from the Philadelphia and the Lexington bank cases (supra, note 1) "is harmful to the banking industry and to its customers. . . . There was unanimous agreement by all the witnesses that the present situation was undesirable and should be changed." The House Committee report states clearly the intent to make changes in the law as follows: "The intended legal effect of the bill is to modify the foregoing provision in three respects:

First, it is intended to make clear that no merger which would violate the antimonopoly section (sec. 2) of the Sherman Anti-Trust Act may be approved under any circumstances.

Second, the bill acknowledges that the general principle of the antitrust laws—that substantially anticompetitive mergers are prohibited—applies to banks, but permits an exception in cases where it is clearly shown that a given merger is so beneficial to the convenience and needs of the community to be served—recognizing that effects outside the section of the country involved may be relevant to the capacity of the institution to meet the convenience and needs of the community to be served—that it would be in the public interest to permit it.

Third, the bill provides that this rule of law is to be applied uniformly, in judicial proceedings as well as by the administrative agencies."

The most complete exposition of the congressional view in the process of this enactment is to be found in the remarks of Senator Robertson at the time the bill, as amended to conform to the House Committee report, came back to the Senate. At that time Senator Robertson, who was Chairman of the Senate Committee which had charge of the bill and who originally introduced the bill in the Senate, was recommending that the Senate accept the House amendment. No member of Congress had remained in closer touch with the bill's progress through both Houses than Senator Robertson. As he put it: "I have lived with this problem day and night for months. I am convinced that we have a good bill." What he then had to say expounded at considerable length the ideas which had been expressed by various House members during consideration of the bill in the House.[8]

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[8] Representative Ashley, one of the members principally in charge of the bill in the House, stated (Cong. Rec. Feb. 8, 1966, p. 2339): "The bill would require the court to use the new standards of the bill in all . . .'post Philadelphia' cases now pending in court. . . . The courts have repeatedly held that under the antitrust laws the social and economic benefits of a given merger cannot even be considered." The Congressman then quoted from the statement to that effect in the Philadelphia case: "It is a primary purpose of the bill to assure that the courts will never again dismiss as irrelevant the question of the needs of a community. . . . [T]he merger must be shown to be sufficiently beneficial in meeting the needs of the community to be served that, on balance, it may properly be regarded as in the public interest." During the same discussion Rep. Stanton, a member of the committee in charge of the bill, (Cong. Rec. Feb. 8, 1966, p. 2343) stated: "[I]t was the expressed purpose and intent of Congress when it passed the Bank Merger Act in 1960 to make certain that control of bank mergers should be in the hands of the appropriate banking supervisory agencies, and that while the competitive effects of a proposed merger should be considered, they were not

Senator Robertson said unequivocally that the purpose of the bill was to "reverse a decision of the Supreme Court." He said (Cong. Rec. Feb. 9, 1966, p. 2538): "The bill will end the confusion and controversy which has surrounded the bank merger situation since the ill-advised and unfortunate decisions of the Supreme Court in the Philadelphia and Lexington cases and the district court decision in the New York case which followed those precedents. It will do this by establishing a uniform rule for the bank supervisory agencies and the courts to follow in bank merger cases: a rule which takes into account both the competitive factors on which the antitrust laws are based—for banks these were written into the Bank Merger Act of 1960—and the convenience and needs of the public to be served by the proposed merged bank." Referring to the pendency of the suit now before us, he said: "It would permit the continuance of proceedings against the three 'post-Philadelphia' cases—in Nashville, San Francisco, and St. Louis—where mergers were consummated after that decision, but in these three cases the courts would be directed to follow the new statutory standards laid down in the statute for all mergers to be considered in the future."

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to be given a predominant position. These standards were repudiated by the Supreme Court in the Philadelphia National Bank and the Lexington Bank cases in which the Court decided that the Justice Department had the final say in bank mergers. Contrary to the intent of Congress, the bank regulatory authorities were relegated to advisory roles.

These provisions . . . reinstate a measure of antitrust consideration which was lacking in the Senate bill, and they provide a banking standard that may allow economic assistance to a community even though a merger tends to lessen competition in that community. It is this statutory balance that was intended in 1960. . . .

The . . . bill . . . directs the courts to apply the banking standards as well as the competitive standards in any judicial proceeding attacking an approved merger transaction . . . it . . . gives these standards equal weight as between economic and competitive circumstances and it assures this equilibrium throughout the entire review procedure."

And in a prepared statement which he incorporated in the record as a part of his remarks he said of the bill: "It will strike the Philadelphia, Lexington, and New York decisions and opinions from the books."[8]

Perhaps the most conclusive evidence of the fact that this Act alters the previous rules comes from a comparison of the language of this statute with what the Supreme Court

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[8] In an effort to find some legislative history to bolster its position that this Act made no changes in the law, the Government has inserted in its brief some quotations from the remarks of individual Congressmen during floor debate. Taken out of context, as they are, they prove nothing. It is true that the wording of § 18(c)(5) emphasized and restated the requirement that the Comptroller, and the reviewing courts, take into consideration the antitrust laws. This was noted in debate, but it was also noted that this Act definitely and positively added a new standard. As stated in the House Report of Supplementary views of Congressman Ottinger who helped draft the bill: "It also assures that banking services available to meet the convenience and needs of a community are considered in all cases and will prevail where they clearly outweigh nonmonopolistic anti-competitive effects of a merger."

Counsel's quotations from the debate ignore the rule stated in Duplex Co. v. Deering, 254 U.S. 443, 474-475, as follows: "By repeated decisions of this court it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the lawmaking body. . . . But reports of committees of House or Senate stand upon a more solid footing, and may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure. . . . And this has been extended to include explanatory statements in the nature of a supplemental report made by the committee member in charge of a bill in course of passage." Counsel have largely confined their quotations to those from Congressman Weltner and Todd, who opposed the bill, and from Congressman Patman who bitterly fought the legislation and finally, through a face-saving compromise, introduced the bill, while stating that if he alone were writing the bill, he "would be against it as a matter of principle." (Cong. Rec. Feb. 8, 1966, p. 2357.) Counsel's choice of makers of remarks is not very persuasive.

said in the Philadelphia case, namely, that a bank merger such as that one "is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial." Section 18(c)(5), quoted above, expressly requires a consideration of similar factors thus rejected in Philadelphia.

This statute makes a further alteration in the nature of the proceeding now before us. After providing for the time of commencement of an action brought under the antitrust laws arising out of a merger transaction, §18(c)(7)(A) stipulates: "In any such action, the court shall review *de novo* the issues presented." Returning now to the provisions of §2(c), requiring this court to "apply the substantive rule of law set forth in §18(c)(5)," and to §18(c)(7)(B), reciting that in any judicial proceeding attacking a merger transaction approved under paragraph 5, "the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph 5," it seems clear that what we are now called upon to do is to review a decision and determination of the Comptroller of the Currency.

To what extent that review can be *"de novo,"* we shall have occasion to discuss hereafter. The immediate difficulty now presented is that the prior decision of the Comptroller of September 30, 1963, was not made under or in the light of the new Bank Merger Act of 1966.

It is true that the Comptroller then found that the proposed merger "will promote the public interest," using the language of the 1960 Act, but his determination did not contain findings covering the precise issues required to be determined by him under the language of §18(c)(5) quoted above. Under that section it would be incumbent upon the Comptroller to determine whether any anti-competitive effects of the proposed merger were "clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." We apprehend that an appropriate finding would specify in what respect the transaction would

meet the convenience and needs of the community to be served.

There is another respect in which the earlier finding of the Comptroller may be inadequate and out-dated. His decision of September 30, 1963, antedated the decisions of the Supreme Court in United States v. El Paso Natural Gas Co., 376 U.S. 651, decided April 6, 1964, and United States v. Penn-Olin Chemical Co., 378 U.S. 158, decided June 22, 1964. In those cases the Supreme Court developed, to an extent not previously announced, the doctrine that §7 of the Clayton Act is designed to preserve not merely present but potential competition in the market in question. This is the doctrine of the application of §7 to potential competition. The principal argument made by the Government here relates to alleged elimination by the merger of *substantial potential competition* in the State of California.

The Act requires this court to proceed in this case in the same manner in which it would have to deal with some future proposed merger. Before we can perform the required function of reviewing the action of the Comptroller, the matter must be remanded for the consideration of the Comptroller under the provisions of the 1966 Act, a proposition we shall discuss hereafter.

Plainly enough the Act is designed to set up precise rules under which the validity of proposed bank mergers may be ascertained and determined. The first required step is the application to the Comptroller of the Currency[4] for written approval of the proposed merger. Upon hearing on such an application the Comptroller is directed to act upon the considerations set forth in §18(c)(5) above referred to. Then, as indicated, if an action be brought attacking the merger transaction, it must be brought within a

[4] It is this officer who must act if the acquiring, assuming or resulting bank is to be a national bank. Where a state bank is to be the resulting one, the decision is to be made by the Board of Governors of the Federal Reserve System. In other cases, the Federal Deposit Insurance Corporation is to make the decision.

limited time and in any such action "the court shall review *de novo* the issues presented." Thus the Act contemplates initial action by the Comptroller followed by a review at the instance of the Department of Justice.

When we face the task of complying with these requirements we are confronted with a difficulty arising out of the fact that the Act provides that this review shall be "de novo."

It will be noted that under §5 the Comptroller is charged with ascertaining two sets of facts. The first is whether the effect of the proposed merger transaction "in any section of the country may be substantially to lessen competition" and the second, whether, having found that there would be anti-competitive effects in the proposed transaction, those effects "are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served."

No difficulty would be presented here so far as reviewing *de novo* the first of these determinations for this court has traditionally adjudged whether mergers have anti-competitive effects. But the problem of reviewing the second determination by the Comptroller, namely, whether the proposed transaction is outweighed in the public interest, and whether it meets the convenience and needs of the community, is plainly and unquestionably a legislative or administrative determination[5] of a type which this court, as a constitutional court, is prohibited from deciding.

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[5] It will be noticed that the standards of § 5 are to be applied in granting or refusing leave to merge in the future. The contemplated action "looks to the future and changes existing conditions by making a new rule to be applied thereafter to .... some part of those subject to [the Comptroller's] power," as fully as the establishment of railroad rates in Prentis v. Atlantic Coast Line, 211 U.S. 210, 226. It involves a determination and establishment of a public policy.

See Finfrock, "Trial de Novo—Panacea?" in 14 Baylor Law Review, 135, where the Texas cases are discussed: "This criterion

The jurisdiction of this court is limited to cases and controversies as that term is used in Article III of the Constitution. As stated in Keller v. Potomac Electric Co., 261 U.S. 428, 444, "legislative or administrative jurisdiction cannot be conferred" on a court such as this. This court, as well as the Supreme Court, "was brought into being by the judiciary article of the Constitution, is invested with judicial power only and can have no jurisdiction other than of cases and controversies falling within the classes enumerated in that article. It cannot . . . exercise or participate in the exercise of functions which are essentially legislative or administrative." Radio Comm. v. General Electric Co., 281 U.S. 464, 469. See also F.P.C. v. Idaho Power Co., 344 U.S. 17, where it was held that the authority of the Court of Appeals to affirm, modify or set aside an order of the Federal Power Commission did not include the power to exercise an essentially administrative function by determining what conditions should attach to a power license. We find an expression of the views of the Supreme Court on the precise question here involved in United States v. Philadelphia Nat. Bank, supra, at page 371. This view is to be found in the words which we have italicized in the following quotation: "We are clear, however, that a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. *A value choice of such magnitude is beyond the*

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in essence classifies as administrative and non-judicial decisional functions which courts are not particularly equipped to decide while leaving to the courts that category of decision making with which it has traditionally dealt and is equipped to handle under the adversary type of judicial procedure. Decisions that require the inquisatorial type of procedure, investigative in nature, and which must, to attain optimum utility, be based upon a mosaic of expert opinion, judgment, and decisions are and should be regarded as non-judicial and left primarily to the administrators. They are far more able to come to grips with such problems than a court or jury in the detached and sterile atmosphere of the courtroom." (p. 160)

ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended §7. Congress determined to preserve our traditionally competitive economy." (Italics ours)

This does not mean that the administrative order of an agency or commission may not be reviewed in a judicial proceeding in a constitutional court; but such a review is necessarily limited to the determination of questions of law and the ascertainment of whether findings of fact by the agency are supported by substantial evidence. Radio Comm'n v. Nelson Bros. Co., 289 U.S. 266, 275 to 276. As stated in Seaboard Air Line R. Co. v. U.S., 382 U.S. 154, 157, the question to be decided is "Whether the Commission has confined itself within the statutory limits upon its discretion and has based its findings on substantial evidence. . . ."

Since it is plain that this court cannot be invested with power to make an original and independent determination as to whether anti-competitive effects are "outweighed in the public interest" or what are the "convenience and needs of the community to be served" we are confronted with the question whether this Act's provision for a review *de novo* must be held null and void and therefore wholly disregarded.

We do not think so. There are certain general principles relating to construction of statutes which should aid us here. In U.S. v. Amer. Trucking Ass'ns., 310 U.S. 534, 543, the Court said: "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable

one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words."

In the case before us the use of the words "de novo," as we have noted, may have full significance in respect to this court's review of the Comptroller's determination of the existence or nonexistence of anti-competitive effects by the merger. But the language of the Act would lead to absurd and futile results if it were construed as requiring this Court to substitute its judgment for the findings of the Comptroller dealing with the public interest and the convenience and needs of the community. This court cannot validly be invested with power to make such a decision which, as we have noted, is plainly legislative or administrative in character. If we look to the purpose beyond the statute and to the policy of the legislation as a whole we must conclude that Congress has framed an Act which contemplates, as an important part thereof, provisions for review of the Comptroller's action.

Other courts have had occasion to deal with an identical problem arising from the use of the words "de novo" in state statutes providing for court reviews of administrative or legislative determinations. In those cases the courts have been confronted with difficulties comparable to those present here, some of them stemming from their constitutional provisions for separation of powers. Thus in Household Finance Corp. v. State, 40 Wash. 2d 451, 244 P. 2d 260, 264, the court, after holding invalid an attempt to vest a non-judicial power in a constitutionally created court, said: "We recognize that there is a wealth of authority to support respondent's position that where the only review of an administrative order that is constitutionally possible is on the question of whether the administrative body or officer acted arbitrarily, capriciously, or in violation of law, it will be held that a provision for a trial *de novo* means only that the appellate or reviewing court will be limited to a consideration of that particular question on

the trial *de novo*. The basis for such holdings is the rule that when a statute is subject to two possible constructions, one of which will render it constitutional and the other unconstitutional, the legislature will be presumed to have intended a meaning consistent with the constitutionality of its enactment." (244 P. 2d 264).

A like decision was made by the Supreme Court of Indiana in State Board v. Scherer, 221 Ind. 902, 46 N.E. 2d 602, 604, where the court said: "It is true that the statute here in question seems to contemplate a de novo proceeding before the court, and a finding of 'guilty' or 'not guilty,' but, regardless of what may seem a legislative intention to the contrary, this court has consistently construed similar statutes as vesting in the courts only such jurisdiction as the Constitution permits."

The same problem confronted the Supreme Court of Texas in Jones v. Marsh, 148 Tex. 362, 224 S.W. 2d 198. In that case the court was called upon to review an order made upon an application for a license to sell beer. The statute provided for an appeal and that such proceeding on appeal "shall be *de novo* under the same rules as ordinary civil suits." The court said (p. 201): "The statute does not expressly provide that there shall be in district court a full retrial of the facts as if there had been no findings made by the county judge, nor does the statute specify what issue or issues shall be tried in the district court. It may, therefore, reasonably be concluded, in view of the subject matter involved and the nature of the order to be reviewed, that only a limited review is intended, and that in so far as the facts which are the basis for the order of the county judge are concerned the question or issue to be determined in the district court is whether or not the findings of the county judge are reasonably supported by substantial evidence. Such a trial is one kind of a trial de novo, and the somewhat limited trial can be held, as the statute requires, under the rules applicable to ordinary civil suits." In other words, the sort of trial which the court could val-

idly hold on review of an administrative order was held to be "one kind of a trial de novo."[6]

It seems reasonable to say that there may be a special kind of review *de novo* involved here, namely, a review involving greater exercise of our judgment in respect to the question of anti-competitive effects, and a review, more limited under the so-called substantial evidence rule, of the Comptroller's determination of weight of public interest and of the character of the needs and convenience of the community.

Another general principle may therefore be applied here. Since the language of the Act could properly be construed to intend the special kind of *de novo* review just referred to, we can "apply the familiar canon which makes it our duty, of two possible constructions, to adopt the one which will save and not destroy. We cannot attribute to Congress an intent to defy the Fifth Amendment or 'even to come so near to doing so as to raise a serious question of constitutional law.'" Anniston Mfg. Co. v. Davis, 301 U.S.

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[6] A like problem was solved in a similar manner in De Mond v. Liquor Control Commission, 129 Conn. 642, 30 A.2d 547, 549, where the court said: "Upon these appeals the court hears and considers all pertinent matters for the purpose of reaching an intelligent conclusion as to the legal propriety of the action of the commissioners. In this qualified sense, but in no other, is its hearing one de novo." Another approach to a similar problem was made in American Beauty Homes Corp. v. Louisville, etc., —— Ky. ——, 379 S.W. 2d 455, where the court held that "the statute was invalid with respect to the trial 'de novo' but still permitted an aggrieved party to appeal. This also was the ruling in California Co. v. State Oil and Gas Board, ... heretofore cited. We think the 'de novo' provision of KRS 100.057 is clearly severable from the rest of this statute."

337, 351, 352. See also Labor Board v. Jones & Laughlin, 301 U.S. 1, 30, and Ex Parte Endo, 323 U.S. 283, 299.[7]

It is plain to us that the congressional purpose here was to provide for an initial decision by the Comptroller and that the action brought by the Department of Justice should be deemed an action to review that decision. It is noteworthy that the section of the statute which uses the term "de novo" does not speak of a trial de novo but of a *review* de novo.

The legislative scheme here, in our view, resembles that which is more elaborately spelled out in those sections of the Interstate Commerce Act which were discussed in the recent case of Seaboard Air Line Co. v. United States, 382 U.S. 154.[8] In that case the three-judge district court had set aside a commission's order approving a railroad merger on the ground that the commission had not adequately determined whether the merger violated §7 of the Clayton Act. The Court said: "By thus disposing of the

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[7] In United States v. Philadelphia Nat. Bank, supra, the Court was confronted with a difficulty arising out of the language of § 7 of the Clayton Act. The Court recognized merit in the contention of the appellees that the merger there involved an assets acquisition and hence that § 7 had no application since the Federal Trade Commission had no jurisdiction over banks. The Court said (p. 337): "Since the literal terms of § 7 thus do not dispose of our question, we must determine whether a congressional design to embrace bank mergers is revealed in the history of the statute." The Court's final conclusion was based upon what it found to be a "plain congressional purpose."

[8] During the debate in the House Congressman Moorhead, one of the members of the committee most actively in charge of the bill, cited and quoted from the Seaboard Air Line case, and also from McLean Trucking Co. v. U. S., 321 U.S. 67, 87, as appropriate precedents for his point: "In the banking industry the public interest is represented and protected by a regulating body. In mergers in such a situation the custom is that the validity of a merger should be determined not exclusively by the competitive factors, but that the regulating body should also consider the public interest." Cong. Rec. February 8, 1966, p. 2340.

case the District Court did not reach the ultimate question whether the merger would be consistent with public interest despite the foreseeable injury to competition." The Court referred to its decision in Minneapolis & St. Louis R. Co. v. United States, 361 U.S. 173, 187, where the Court described the impact of congressional legislation by saying "Even though such acquisitions might otherwise violate the antitrust laws, Congress has authorized the Commission to approve them, if it finds they are in the public interest. . . . It must be presumed that, in enacting this legislation, Congress took account of the fact that railroads are subject to strict regulation and supervision. 'Against this background, no other inference is possible but that, as a factor in determining the propriety of [railroad acquistions] the preservation of competition among carriers, although still a value, is significant chiefly as it aids in the attainment of the objectives of the national transporation policy.'" The Court continued "Resolution of the conflicting considerations 'is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission "to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but in its coordination of all other forms." 79 Cong. Rec. 12207. "The wisdom and experience of that commission," not of the courts, must determine whether the proposed [acquisition] is "consistent with the public interest."...'"

The action of the Supreme Court in those cases dealing with the right of the Interstate Commerce Commission to approve a merger notwithstanding its anticompetitive effects, and particularly the language above quoted from the Seaboard Air Line case, would seem to make negative another argument of the Government. This is that the language of §18(c)(5) referring to the "convenience and needs of the community to be served" is but a reiteration of the "failing company doctrine" long recognized as "an

integral part of settled antitrust law" No such limiting suggestion was ever made in the Seaboard Air Line and the other cases dealing with the same statute. In our view it would be absurd to find that the new standards so carefully framed for the 1966 Bank Merger Act were no more than the inclusion of a wholly unnecessary reference to the "failing company doctrine." There is not the slightest indication in the language of the Act, or in its legislative history, to support the Government's effort thus to cancel or dissipate the declared purpose of the Act. During the debate on the bill, the question of the situation of the failing bank was mentioned, and in a colloquy between Congressman Weltner, who opposed the bill, and Congressman Multer, who supported it, it was made plain that the language referred to was not limited to the failing bank situation.[9]

The careful and precise description of this portion of the bill, made by Senator Robertson to the Senate as the latter body prepared to accept the House version, would

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[9] After Congressman Multer had given an illustration of how this language would apply in a case not involving a failing bank, the following colloquy occurred:

"Mr. Weltner. This is a case of a failing bank, which has long been recognized by the court. It has nothing to do with this legislation. I am sure the gentleman from Wisconsin will agree with me, that we do not have to pass any bill to permit the approving agency to merge a failing bank in order to save it from insolvency. I am certain that the gentlemen from New York, indeed, would say, as a well-educated lawyer, that the failing bank doctrine exists independently of any statutes which has been passed in the last 20 or 30 years. I yield to the gentleman for the purpose of responding to the correctness of that proposition.

Mr. Multer: The gentleman is correct as far as he goes, but I have gone beyond the failing bank theory. There are many instances were we are not concerned with the failing bank, where there is an absolute and complete diminution of competition, yet under all the circumstances and all of the factors the courts should approve that merger just as the regulatory agencies may approve the merger."

Cong. Rec. Feb. 8, 1966, p. 2346.

clearly negative any suggestion that it was limited to the failing company situation.[10]

A final answer to the Government's "failing company" theory is found in the House Report's indication as to the limited extent of the use of financial resources of the affected banks. That report states (U.S. Code, Cong. and Administrative News, 89th Cong. 2d Session, p. 337): "However, only the convenience and needs of the community to be served can be weighed against anticompetitive effects, with financial and managerial resources being considered only as they throw light on the capacity of the existing and proposed institutions to serve the community."

One problem which we confront in this particular case is how we shall apply the rules which are prescribed in the Act. In the case of future mergers the method of procedure and the application of the statutory requirements is quite simple. First, the banks seeking to merge will make their application for approval to "the responsible agency" in a case of this kind, the Comptroller of the Currency. The agency will then hold the hearings and make the determination contemplated by §18(c)(5) of the Act which, as

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[10] He said: ". . . this bill, should convince the courts that the Congress does not intend that mergers in the banking field should be measured solely by the antitrust considerations which are applied in other industries." (Cong. Rec. Feb. 9, 1966, p. 2541.) In short, something apart from the older antitrust considerations, (including the failing company rule) are imported here. He also said (p. 2542): "The courts will no longer be able to say—in the case of a merger which does not reach to the point of creating a monopoly—that proof that a merger will have demonstrable benefits or will be benign is irrelevant. On the contrary, the question whether there are or are not demonstrable benefits—whether the merger is benign or malignant—will be the heart of the issue." Again he said (p. 2542): "The effect of the merger on the public interest and on the convenience and needs of the community to be served must be measured in specific and realistic terms in the light of the kinds of business involved and the kinds of people being served. The banking agencies and the courts must be guided by the realities of the industrial, commercial, and financial worlds. They must look through theories and percentages and doctrines to the hard facts of life."

we have indicated, calls for two determinations—whether the merger will have a tendency substantially to lessen competition and whether the anti-competitive effects, if found, are clearly outweighed in the public interest by the probable effect of the transaction in meeting the needs and convenience of the community to be served.

The Act then provides that any action brought under the antitrust laws arising out of this merger transaction shall be commenced within a short period following the Comptroller's approval and in this judicial proceeding "the standards applied by the court shall be identical with those that the banking agencies are directed to apply under §5." Also, in any such action, the court is required to review in the manner we have mentioned, the issues presented. The Act, making reference to this, and other cases initiated after June 16, 1963, with respect to a merger consummated after that date, requires us to apply the same substantive rule of law that we would apply in the case of any future merger.

Here, however, the merger is already accomplished; it was accomplished pursuant to a September 30, 1963, approval by the Comptroller who purported to act under the provisions of the 1960 Bank Merger Act. That Act, as demonstrated by the decision of the Court in Philadelphia Bank, supra, was without force and effect, and the Comptroller's decision of September 30, 1963, cannot, we think, be the equivalent of a determination by him under the 1966 Bank Merger Act or in accordance with §18(c)(5) thereof. The question is whether we may now require the Comptroller to proceed under the new Act and to make the determination called for by the last mentioned section preliminary to our further consideration of the same and a review thereof.

We think that the decision in United States v. Morgan, 307 U.S. 183, furnishes a precedent.[11] The Court upheld

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[11] In that case the Secretary of Agriculture made an order reducing stockyards rates. After those rates had gone into effect the Supreme Court set aside the order of the Secretary because of procedural defects and the cause was remanded to the district court

the right of the Secretary of Agriculture to make an order going beyond fixing rates for the future, stating that he was "now free to determine a reasonable rate for the period antedating the order he may now make," that is to say, during a period following his former invalid order. The Court noted the duty of the administrative agencies and of the courts judicially reviewing their action to coordinate their actions in order to secure the plainly-indicated objects of the statute.

We think that in this case this court cannot as a practical matter apply the substantive rule of law set forth in §18(c)(5) of the Act unless it has before it for review an order of the Comptroller made pursuant to the requirements of that section. Not only because we are here required to review an administrative order as a part of our consideration of this case, but also because the Comptroller has made himself a party to this proceeding and subject to our orders, we shall now remand the cause to the Comptroller with directions to proceed to make the determinations called for by the Bank Merger Act of 1966. This we think to be appropriate in view of the requirements of the Act notwithstanding the actual merger has been completed.

This remand is predicated upon the assumption that after a new order has been made by the Comptroller, we will be able to review the same. As we have indicated, our power to review any determination as to the anti-competi-

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for further proceedings. The Court stated that it would not attempt to forecast what further proceedings the Secretary might see fit to take. The district court which had entered a temporary restraining order enjoining the enforcement of the Secretary's order had required the excess charges collected by the stockyards over and above the amount prescribed by the Secretary to be deposited with the court pending final determination of the case. The Secretary then reopened the original proceedings and pending these proceedings the district court granted the appellees' motion to distribute the fund mentioned among them. This decision was based upon a ruling that the Secretary did not have authority to make an order prescribing rates and charges effective as of the date of his original order.

tive effects will allow a greater exercise of our own judgment, than our power to review a determination as to whether the anti-competitive effects, if any, are clearly outer the anti-competitive effects, if any, are clearly outweighed in the public interest and as to the effect of the transaction in meeting the needs and convenience of the commuinty to be served. In making his determination the Comptroller should make specific findings as to the competitive situation as to which the merger may have operative effects and particularly whether the merger will have a probable tendency to lessen or do away with potential competition.

In passing upon the question of the probable effect of the transaction in meeting the needs and convenience of the community to be served, the Comptroller should specify particularly what he finds to be the convenience and needs of the community, what he considers will be the effect of the merger thereon, and how and by what means he weighs these effects as against the anti-competitive effects of the transaction. Furthermore, in order to avoid any possible necessity for further remand following our review of the Comptroller's order, he is directed to make a finding as to whether, assuming that the merger has the effect upon potential competition which the Government claims, that effect would be outweighed in the public interest by the probable effect of the transaction in meeting the interest and convenience of the community to be served.[12]

In holding that our function now, under the 1966 Act, is to review an appropriate order of the Comptroller, we are disapproving other alternatives. One alternative would be to hold that we must disregard any suggestion for a review and simply decide the case on the evidence now before us, applying directly the standards set forth in §18(c)(5). Such, we think would not be consonant with

[12] Note the usefulness of findings based on assumptions made by the district court in United States v. Philadelphia Nat. Bank, supra, at p. 335 of 374 U.S.

the clear purpose and intent of the Act. Plainly the whole intent was that there should be made available determining the validity of bank mergers the expertise of persons familiar with banking and with the operating procedures of banks. Not only is this court constitutionally without power to evaluate such features of the "probable effect of the transacation in meeting the convenience and needs of the community to be served," but we lack the informed experience properly to apply such tests.

To deny the banks involved in these three "post-Philadelphia" actions the benefits of these banking-economic tests by specialized agencies would run counter to what the legislative history of the Act indicates was the attitude of Congress toward these three mergers. As the bill first came from the Senate it would have provided that this merger "shall be exempt from the antitrust laws." In its final form the bill exempted only the pre-Philadelphia mergers. But the bill would, as Senator Robertson stated, "permit the continuance of proceedings against the three post-Philadelphia cases—in Nashville, San Francisco, and St. Louis—where mergers were consummated after that decision, but in these three cases the courts would be directed to follow the new statutory standards laid down in the statute for all mergers to be considered in the future." Surely Congress was not swinging from a most favorable treatment of this merger to an opposite extreme of denying it the expertise contemplated for all mergers in the future.

Another holding, in the alternative, would be that since this court cannot validly entertain a question as to "the probable effect of the transaction in meeting the convenience and needs of the community to be served," the requirement that we "shall apply the substantive rule of law set forth in §18(c)(5)" must be held inoperative and disregarded, and therefore this action must proceed as if the Act had not been passed. Such an unnecessary and uncalled for disregard of the obvious purpose and intent of the Act is unthinkable.

We anticipate that the defendant banks will suggest that we should simplify this whole matter by finding now, once and for all, that the claimed adverse affect upon competition has not been established and that the merger will not have the effect either substantially to lessen competition, whether actual or potential, or to tend to create a monopoly or operate in restraint of trade. But, as indicated in Seaboard Air Line R. Co., supra, that is not the ultimate question to be determined in this litigation, and we shall not invite a repetition of the error corrected in that case.

It is therefore ordered that further proceedings herein shall be stayed pending the further consideration by the Comptroller, in the manner hereinabove indicated, of the questions required to be passed upon under §18(c)(5). In reaching his determination the Comptroller will, of course, give the notices and provide the opportunity for hearing contemplated by the Act. We assume the parties will assist in shortening the proceedings by agreeing that the Comptroller may consider the evidence adduced at our last hearing, as well as that at his first hearing, particularly in view of the rule that administrative agencies have never been restricted by the rigid rules of evidence. Trade Comm'n v. Cement Institute, 333 U.S. 705; cf. Davis, Administrative Law, vol. 2, §14.08.

Upon certification to this court of the proceedings of the Comptroller, this court shall proceed in such manner as may be called for by the Comptroller's decision.

It is so Ordered.

This opinion contains the court's findings and conclusions.

/s/ Walter Pope
United States Circuit Judge

/s/ W. T. Sweigert
United States District Judge

/s/ Alfonso J. Zirpoli
United States District Judge

APPENDIX F

[Received Nov. 22, 1966]

In the District Court of the United States for the Middle District of Tennessee, Nashville Division

United States of America, *Plaintiff*

v.

Third National Bank of Nashville and Nashville Bank and Trust Company, *Defendants*

and

The Comptroller of the Currency, *Intervenor*

Civil Action No. 3849

Opinion

This action was instituted August 10, 1964 by the United States, acting through the Department of Justice, under §4 of the Sherman Act, 15 U.S.C.A. §4, and §15 of the Clayton Act, 15 U.S.C.A. §25, to enjoin the proposed merger of the Third National Bank in Nashville (Third National) and the Nashville Bank & Trust Company (Trust Company). Violations of §1 of the Sherman Act, 15 U.S.C.A. §1, and §7 of the Clayton Act, 15 U.S.C.A. §18, were charged in the complaint. Acting pursuant to the Bank Merger Act of 1960, 12 U.S.C.A. §1828(c), the Comptroller of the Currency, notwithstanding adverse reports on the competitive factors involved from the Attorney General, the Federal Reserve Board, and the Federal Deposit Insurance Corporation, approved the merger on August 4, 1964 on the basis of a written opinion and detailed findings of fact. Plaintiff's motion for a preliminary injunction was heard August 14 and 15, 1964; it was denied August 18, 1964; and the merger was consummated the same day. Before trial on the merits and after extensive pretrial proceedings in this action, Congress enacted Public Law 89-356, 80 Stat. 7, as an amendment to §18(c) of the Federal Deposit Insur-

ance Act, 12 U.S.C.A. §1828(c). The Amendment, approved February 21, 1966 and referred to as the Bank Merger Act of 1966, effected material changes in the 1960 Bank Merger Act. By §2(c) the Amendment was made applicable to pending antitrust actions involving bank mergers consummated after June 16, 1963. The significance of that date was that the Supreme Court of the United States then rendered its opinion in *United States* v. *Philadelphia National Bank, et al.,* 374 U.S. 321, holding that the Bank Merger Act of 1960 did not, by directing the banking agencies to consider competitive factors before approving bank mergers, immunize mergers approved by them from later judicial challenge under the antitrust laws. Despite prior approval by the Comptroller of the merger of the second and third largest commercial banks in *Philadelphia,* the Court held the proposed merger to be forbidden by §7 of the Clayton Act and such merger was accordingly enjoined. So, absent the 1966 Amendment, the Court's only task in this case would be to determine whether the merger now under scrutiny runs afoul of antitrust laws without regard to any of the banking factors enumerated in the 1960 Act. It is clear, however, that the Amendment introduces new standards to be applied by the banking agencies, by the Department of Justice, and by the courts alike. It reflects the congressional attempt to reconcile the judicial application of antitrust concepts with the standards applied by federal banking agencies in evaluating merger applications under the 1960 Act. By §18(c)(5)(B) of the Federal Deposit Insurance Act, as amended by the 1966 Amendment, it is provided that the responsible agency shall not approve any proposed merger transaction which shall violate the specified antitrust standards "unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." The Amendment then proceeds in the immediately following paragraph: "In every case, the responsible agency shall take into consideration

the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served." [1]

By §18(c)(7)(B) it is provided that the "standards" applied by the courts in antitrust actions attacking bank mergers "shall be identical with those that the banking agencies are directed to apply under paragraph (5)," and by §2(c), courts are directed to "apply the substantive rule of law set forth in §18(c)(5) of the Federal Deposit Insurance Act, as amended by this Act" in all antitrust litigation pending before them on and after the date of enactment of the 1966 Amendment with respect to all mergers consummated after June 16, 1963, the date of the Supreme Court decision in *Philadelphia*.

Thus from the terms of the Amendment as well as from its legislative history,[2] the basic congressional intent in enacting the 1966 Amendment appears to be clearly mirrored: Bank mergers must be examined and analyzed by

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[1] Sec. 18(c)(5) of the Federal Deposit Insurance Act as amended by the 1966 Amendment provides:

The responsible agency shall not approve—

(A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighted in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

[2] H.R.Rep. 1221, 89th Cong. 2d Sess. (1966), Bank Merger Act Amendment.

the agencies and by the courts in terms of the antitrust standards prescribed in the Amendment, such analysis to include consideration of the enumerated special banking factors, and any violations of such standards shall constitute a barrier to bank mergers unless "clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." "In every case," as the Amendment explicitly provides, there shall be taken into account "the financial and managerial resources and future prospects of the existing and proposed institutions and the convenience and needs of the community to be served." The banking industry is thus recognized as occupying a unique place in our national economy requiring a specialized set of antitrust standards, and under prescribed conditions exemption from the operation of antitrust consequences altogether with the exception of those prescribed in §18(c)(5)(A).

Before adverting to the merits of this case, it becomes necessary to resolve a problem of procedure. This problem arises because the Comptroller formally approved the merger prior to the 1966 Amendment and in the light of the factors of the Bank Merger Act of 1960. While the 1960 Act required him to consider anticompetitive effects, it did not require him to accord this factor any particular weight or to determine antitrust issues per se.[8]

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[8] The 1960 Bank Merger Act applied to all banks insured by the Federal Deposit Insurance Corporation and banking agencies in considering merger applications were required to evaluate:

(1) The financial history and condition of each of the banks involved; (2) the adequacy of its capital structure; (3) its future earnings prospects; (4) the general character of its management; (5) the convenience and needs of the community to be served; (6) and whether or not its corporate powers are consistent with the purposes of this chapter . . . the appropriate agency shall also take into consideration the effect of the transaction on competition (including any tendency toward monopoly) and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest. (12 U.S.C.A., § 1828 (c) (1964)).

In *United States v. Crocker-Anglo National Bank, et al.*, C.A. 41,808, United States District Court, Northern District of California, 35 L.W. 2209, a three-judge court rendered its opinion on October 6, 1966 in one of the three post Philadelphia cases pending at the date of the enactment of the 1966 Amendment in which mergers had been consummated after the *Philadelphia* decision. The other two pending cases were the present case and a case pending in St. Louis. Although mergers consummated before the *Philadelphia* decision were exempted from Sherman §1 and Clayton §7, the new antitrust standards of the 1966 Amendment were made to apply to all mergers consummated after that decision, including those challenged in the three pending cases, as we have seen. In *Crocker-Anglo*, as in this case, the Comptroller of the Currency had approved the merger prior to the 1966 Amendment by applying the different criteria of the 1960 Bank Merger Act. He had not assessed its validity under the standards of the 1966 Amendment. The California Court, pointing out that under §18(c)(7)(A) courts are directed to "review de novo the issues presented" in actions under the 1966 Amendment, stated:

> No difficulty would be presented here so far as reviewing *de novo* the first of these determinations for this court has traditionally adjudged whether mergers have anticompetitive effects. But the problem of reviewing the second determination by the Comptroller, namely, whether the proposed transaction is outweighed in the public interest, and whether it meets the convenience and needs of the community, is plainly and unquestionably a legislative or administrative determination of a type which this court, as a constitutional court, is prohibited from deciding.

Entertaining this view the Court construed the 1966 Amendment as limiting the Courts' role in pending cases as well as in all future cases to a review of the findings made by the Comptroller pursuant to the 1966 criteria. As there were no such findings by the Comptroller before

the court in *Crocker-Anglo,* it was directed that the action be remanded to the Comptroller to update his findings and conclusions under and in the light of the new standards of the 1966 Amendment. It was intimated in the opinion that the court's power to review such findings as to anti-competitive effects would be somewhat broader in scope than its power to review the Comptroller's findings that anticompetitive effects are "clearly outweighed in the public interest," or as to what constitute the "conveniences and needs of the community to be served." As to the latter, the courts would be restriced to a "determination of questions of law and ascertainment of whether findings of fact by the agency are supported by substantial evidence," taking into account not only the evidence before the Comptroller but also any additional evidence made a part of the record at the trial. The *Crocker-Anglo* interpretation of the 1966 Amendment as to the scope of the judicial function in the three cases pending at the time of its enactment is supported by a carefully reasoned opinion, although it must be conceded that the issue of statutory interpretation is not free from difficulty. In any event it is not deemed necessary in this action to follow the example of the California Court in remanding the action to the Comptroller for findings specifically formulated under the new criteria of the 1966 Amendment. In *Crocker-Anglo* the trial occurred before the effective date of the 1966 Amendment, and that court accordingly did not have before it any findings by the Comptroller assessing the merger on the basis of the newly enacted standards. Under such circumstances, it was the court's view that a remand to the Comptroller for updating his findings and conclusions was the proper and expedient course to follow. In contrast, the present action was tried after the 1966 Amendment and the Comptroller's assessment of the present merger under the new criteria and standards of the Amendment has been presented to the Court in various ways. First, having intervened as a party to the action under the provisions of the 1966 Amendment allowing

such intervention as of right, (§18(c)(7)(D) of the Federal Deposit Insurance Act, as amended), he has filed a formal answer setting forth his views that the merger is not substantially anticompetitive when evaluated under the terms of the 1966 Amendment, and that any anticompetitive effects are clearly outweighed in the public interest by the convenience and needs of the community to be served. The same views and opinions have been presented to the Court by the Comptroller, acting through his attorney, at various stages during the trial, including the making of oral arguments, the filing of written briefs, and the filing of suggested findings of fact and conclusions of law to be approved by the Court. Of greater significance, however, is the fact that the Comptroller appeared as a witness at the trial and expressed the same views and opinions in response to numerous questions on direct and cross examination. His testimony convincingly demonstrated that he was entirely familiar not only with the new standards of the 1966 Amendment, but also with the essential and material facts which had been developed at the trial. Like testimony was given by the Regional Comptroller of the Currency. There is no reason to conclude that these steps were not taken by the Comptroller in good faith. Nor are the Comptroller's opinions expressed as a witness under oath entitled to any less weight because he saw fit to intervene as a party in the action. If he concluded that the merger met the tests of the 1966 Amendment, as he obviously did, it was his right, if indeed it was not his duty, to intervene in the action to support that conclusion and to make his views, opinions and findings known to the Court.

The trial was a protracted one, extending over approximately six weeks and involving some 3,800 pages of transcrip. A remand to the Comptroller could only serve the purpose of further delay. It is idle to suppose that any further significant evidence could be unearthed, or that the Comptroller would be likely to come to any different conclusion, or that he could have any better grasp of the

controlling facts than he possessed at the trial. Since the purposes of a remand have been substantially accomplished in the manner indicated, and since the Comptroller's findings and opinions are before the Court under both the 1960 Bank Merger Act and the 1966 Amendment, the Court concludes that the remand procedure is not required.

What, then, is the scope of judicial review? Applying the rationale of the *Crocker-Anglo* opinion, the Court's review of anticompetitive effects should be broader than "public interest" and "convenience and needs." The banking agency's finding on the first issue should be accorded some weight in view of its expertise and the technical and complex nature of the banking industry, but since a violation of antitrust standards is primarily a legal issue which courts have traditionally considered they should make an independent determination which respect to it. On the other hand, since the question whether anticompetitive effects are outweighed in the public interest by the convenience and needs of the community is, in the language of the *Crocker-Anglo* opinion, "plainly and unquestionably a legislative or administrative determination . . .," the Comptroller's findings should not be disturbed unless they are unsupported by substantial evidence. This view finds strong support in the statement of the Supreme Court in *Philadelphia,* at p. 371:

> We are clear, however, that a merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence. . . .

In seeking to void the merger under investigation the plaintiff relies upon Section 1 of the Sherman Act as construed in *United States v. First National Bank of Lexington,* 376 U.S. 665 (1964), and upon Section 7 of the Clayton Act as construed in *United States v. Philadelphia National Bank, supra.* As in *Lexington* and *Philadelphia,*

the plaintiff's case rests primarily upon inferences derived from statistics and upon the rules of prima facie invalidity enunciated in those cases. It is argued that the merging banks were "major competitive factors" in the relevant Davidson County market, that the merger resulted in the elimination of competition between them, and, consequently, that the case falls squarely within the ambit of the Supreme Court ruling in *Lexington* under Section 1 of the Sherman Act. A fortiori, it is argued that the merger is forbidden under the less stringent provisions of Clayton Section 7. It is further insisted, independently of the Sherman Act, that the merger must fall under Clayton Section 7 standards as delineated in *Philadelphia*, in that (a) the merger has produced a firm controlling an undue percentage share of the relevant market, and (b) it has resulted in a significant increase in the concentration of firms in that market. It is therefore said that the merger "is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." In this case the plaintiff says that there is no such countervailing evidence. Plaintiff also relies upon the statement in a footnote of the *Philadelphia* opinion that "if concentration is already great, the importance of preventing even slight increases in concentration . . . is correspondingly great." Plaintiff would drastically minimize the effect of the 1966 Amendment. Its position as to the impact of the Amendment is thus succinctly stated in its trial brief.

> The 1966 Amendment did not change materially the tests of antitrust legality applicable in bank merger cases. The Act was designed primarily (1) to require the bank supervisory agencies to give more weight than heretofore to the competitive factor in ruling on future merger applications, (2) to remove any impression that the standards of Philadelphia and those of the Bank Merger Act of 1960 differ in fact, and (3) to make it clear that, as suggested in Philadelphia, limited recognition was to be given to

> the special features of commercial banking in terms of consideration of the "banking factors"—primarily a failing company doctrine with "somewhat larger contours," Philadelphia National Bank, supra, 374 U.S. at 372 n. 46.

Taking notice of the suggestions in the *Philadelphia* opinion that the failing company doctrine may have somewhat larger contours in the banking area, the plaintiff would construe the banking factors enumerated in the 1966 Amendment as being concerned primarily with the question of solvency and protection of the community against a failing bank. This is true, as the plaintiff insists, not only with respect to financial and managerial resources, but also with respect to the concept of convenience and needs of the community.

The plaintiff's restrictive interpretation of the 1966 Amendment finds little support either in legislative history or in the text of the Amendment itself. On the contrary, both legislative history and the textual provisions of the Amendment strongly indicate that it was the intent of Congress to effect substantial changes in existing antitrust law relative to bank mergers as enunciated in the *Lexington* and *Philadelphia* cases. *United States v. Crocker-Anglo National Bank, et al., supra.* After the decision in the *Philadelphia* case, the validity of bank mergers was made to depend in the final analysis, if challenged in the courts, upon the application of traditional antitrust standards. Except for the vague intimation that the failing company doctrine might have somewhat larger contours in bank merger cases, no consideration was to be given in an action challenging Bank mergers under antitrust laws to the special banking factors contained in the 1960 Bank Merger Act. Essentially what the 1966 Amendment does is to change this ultimate test of validity from one depending strictly upon antitrust laws to a test balancing antitrust considerations with the special factors recognized by Congress as peculiarly applicable to the banking industry. The House Report on the 1966 Bank Merger

Amendment clearly sustains this view. Under the heading, "What the Bill Would Do," it is stated that it would establish a single set of standards for the consideration of future mergers by the responsible banking supervisory agencies, the Department of Justice, and the courts under the antitrust laws—standards stricter than those in the Bank Merger Act "but which include both the effect on competition and the convenience and needs of the community to be served," a standard clearly different from that of the *Lexington* and *Philadelphia* cases.

It is pointed out under the heading, "The Need for the Legislation," that the committee had heard the contention made that banking is such a unique industry and that the determination of where the public interest lies in a given bank merger situation requires such special expertise that any bank merger which has been approved by the appropriate federal supervisory agency should be absolutely immune from antitrust attack. On the other hand, the committee had heard the contention advanced with equal vigor that any bank merger whose effect would be to lessen competition should on that ground alone be absolutely prohibited, and that neither agencies nor courts should be permitted to examine the question of whether the overall effect of such merger might be in the public interest.

Under the heading "Purpose of the Bill," the floundering bank problem is discussed as follows:

> Under general antitrust law criteria, particularly as they have been developed over the past few years, the banking agencies find it difficult to deal as they would like with the floundering bank problem in medium to smaller sized communities. The problem arises where there is a relatively small number of banks, and one or more of these banks appear to be stagnating. It may be because it is below the economic minimum size to attract capable and vigorous management personnel, it may be because it is closely held by owners who insist on unrealistically conservative policies, or it may be for any other reasons which are discernible only by an examination of that particular bank as an individual institution. The banking

> agencies, with some differences in degree among themselves, have contended that they should be able to consider a merger application on the basis of such an individual examination, and to approve it if they believe that the result would be a more vigorously competing institution, furnishing better overall service to the community, even though the reduction in the number of competing units, or the concentration in the share of the market in one or more lines of commerce, might result under general antitrust law criteria in a substantial lessening of competition.

As to the intended legal effect of the Bill, the House Report proceeds:

> First, it is intended to make clear that no merger which would violate the antimonopoly section (sec. 2) of the Sherman Anti-Trust Act may be approved under any circumstances.
>
> Second, the bill acknowledges that the general principle of the antitrust laws—that substantially anticompetitive mergers are prohibited—applies to banks, but permits an exception in cases where it is clearly shown that a given merger is so beneficial to the convenience and needs of the community to be served—recognizing that effects outside the section of the country involved may be relevant to the capacity of the institution to meet the convenience and needs of the community to be served—that it would be in the public interest to permit it.
>
> Third, the bill provides that this rule of law is to be applied uniformly, in judicial proceedings as well as by the administrative agencies.

Turning to the text of the 1966 Amendment, it becomes even clearer that bank mergers are sui generis, to be assessed as to anticompetitive effects not alone on the basis of the quantitative analyses of the *Lexington* and *Philadelphia* cases, but, in addition, by taking into account all material factors with respect to each institution in the setting of the relevant market, and by evaluating the special banking factors delineated in §18(c)(5)(B). By

that section, as we have seen, not only may anticompetitive effects be outweighed by the convenience and needs of the community to be served, but responsible agencies and courts alike are mandated to take into consideration "in every case" the following special factors:

(1) Financial resources of the existing and proposed institution;

(2) Their managerial resources;

(3) Their future prospects; and

(4) The convenience and needs of the community to be served.

There is nothing in the language of this section to indicate that the special banking factors were to be given limited recognition only, or that they were to be concerned primarily with the question of solvency. It is clear that the factors embrace the problem of the failing bank as well as that of the "floundering" or "stagnating" bank. Certainly possible insolvency is an important consideration, but it may be of equal importance to the economy to eleminate a bank which has reached a point of deterioration or stagnation and to permit its merger with a "more vigorously competing" institution. Are the cases of floundering banks the "somewhat larger contours of the failing company doctrine" to which plaintiff refers? The answer from legislative history justifies an affirmative answer.

Nor does the language of Section 18(c)(5)(B) support the thesis that agencies and courts in considering anticompetitive effects in bank merger cases are to be hamstrung by cold statistics and are not to be allowed to look to the total facts in context to determine whether the statistics reflect the true competitive situation.

Mr. Justice Harlan, dissenting in the *Lexington* case, expressed the view that Congress in the Bank Merger Act of 1960 had plainly indicated that it did not intend that

mergers in the banking field should be measured solely by the antitrust considerations which are applied in other industries. He further stated that adherence to the principles enunciated in *United States v. Columbia Steel Co.*, 334 U.S. 495,[4] "would leave room for an accommodation within the framework of the antitrust laws of the special features of banking recognized by Congress." Because of the ruling in *Philadelphia,* this accommodation was not effectively accomplished by the 1960 Bank Merger Act, but the Court is persuaded that the accommodation to which Mr. Justice Harlan referred is the fundamental purpose and effect of the 1966 Amendment in providing that anticompetitive effects may be outweighed in the public interest by the convenience and needs of the community, and that consideration shall be given in every case to the qualitative banking factors specifically enumerated. These factors are sufficiently comprehensive in character not only to embrace the *Columbia Steel* criteria, but also to require an even broader scope of inquiry and analysis with respect to antitrust issues.

The Court's construction of the 1966 Amendment is supported by the Amendment's provision that bank mergers shall be considered in the first instance by the responsible banking agency, applying the standards of Section 18(c)(5), by the requirement that courts shall apply identical stand-

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[4] These principles were stated in the Columbia Steel opinion as follows:

In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market. We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor. The relative effect of percentage command of a market varies with the setting in which that factor is placed. At page 527.

ards, and by the provision that the Courts' role shall be limited to reviewing de novo the issues presented under the 1966 Amendment. If it was the purpose of the Amendment simply to perpetuate without modification the *Lexington* and *Philadelphia* antitrust criteria in the banking field, it is not apparent why Congress would have emphasized by these provisions the importance of the responsible agencies' expertise with respect to bank mergers. The structuring of the Act in this respect cannot be reconciled with the logic of the *Philadelphia* decision that courts must determine the validity of bank mergers on the basis of antitrust considerations alone—primarily derived from statistics—independently of and without regard to the special features of banking recognized by Congress. Whereas under the *Philadelphia* rationale, courts determined anticompetitive effects without regard to banking factors and banking agencies determined both, a balanced consideration of anticompetitive effects and banking factors is now enjoined upon both agencies and courts, the agencies speaking first and the courts reviewing "de novo" the issues presented.

Entertaining these views as to the thrust of the 1966 Amendment, the Court is of the opinion that while the plaintiff has established an arguable case for condemnation of the merger under the pre-1966 standards of the *Lexington, Philadelphia* and other cases, treating Davidson County as the relevant geographic market and commercial banking as the services or products market,[5] the merger

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[5] The Court rejects the defendants' and intervenor's argument that in assessing the anticompetitive effects of the merger the relevant geographic market is the broad area served by Third National's correspondent banking system. There is no significant legislative history to support the view that the 1966 Amendment was intended to change the relevant geographic market concept as developed in antitrust law. The Court is of the opinion under the facts of this case that the relevant geographic market is Davidson County. This is "where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." *United States* v. *Philadelphia National Bank, supra,*

is not violative of the new antitrust standards of the 1966 Amendment.

The term "arguable case" is used for the reason that there are at least some conspicuous points of difference between the case at bar and *Lexington* and *Philadelphia*, whether or not such differences are of controlling significance. In the *Lexington* case, the Supreme Court held invalid under Section 1 of the Sherman Act the consolidation of the first and fourth largest commercial banks in Fayette County, Kentucky. Before the consolidation the largest bank, First National, had approximately 40% of the assets, deposits and loans in the relevant market which was determined to be Fayette County. The fourth largest bank, Security Trust, before the consolidation had approximately 12% of the assets, deposits and loans. After the consolidation, the new bank, First Security, had approximately 52% of the assets, deposits and loans. The bank established by the consolidation was larger than all of the remaining banks combined. In addition to these statistics reflecting "bigness," the Court relied upon the testimony from three of the four remaining banks that the consolidation would "seriously affect their ability to compete effectively over the years." It was concluded that the two banks before the consolidation were major competitors and that the elimination of significant competition between them constituted an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.

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at p. 357. Also, on the clear preponderance of the evidence in this case the appropriate "line of commerce" by which to appraise the competitive effects of the merger is the cluster of products and services denoted by the term commercial banking. The Court does not agree that the omission of the words "in any line of commerce" from the 1966 Amendment is indicative of a congressional intent to reject "commercial banking" as a distinct line of commerce in appraising anticompetitive effects. It cannot be presumed that such an important change in established antitrust law would be made by mere omission. Again, there is really no significant legislative history to support the defendants' and intervenor's position on this point.

The statistics of the present case, of course, are not as impressive as those in *Lexington.* Third National, having approximately 33% of assets, deposits and loans before the merger, possessed approximately 38% in these categories after the merger. It was second in size before the merger and it retained the same position in the Davidson County market after the merger. The Trust Company's share of assets, deposits and loans before the merger was only approximately 5% as compared with the 12% of the smaller bank in *Lexington.* There is no comparable testimony in the present case from any of the remaining banks in Davidson County that the consolidation will seriously affect their ability to compete effectively. In *Philadelphia* a 30% market share resulting from the merger was regarded as undue, as compared with approximately a 38% market share in the present case; but in *Philadelphia* the merger resulted in a 33% increase in concentration between the two largest banks; whereas the increase in the present case between the three largest banks is approximately 5%.

The *Philadelphia* merger formed a bank which became the largest in the market area; whereas, in this case, as pointed out, the new banking institution will continue to occupy second place. In *Philadelphia* neither of the banks involved had antitrust clean hands—the Philadelphia National having acquired nine formerly independent banks and Girard having acquired six, such acquisitions having extended over a long period of time into the recent past. In the case at bar, there is no significant merger history either with respect to the two banks or in the Davidson County commercial banking market.

Other differences could be pointed out, but it is clear to the Court that whatever the result in this case may have been before, the merger now under consideration does not run afoul of antitrust standards when evaluated in the terms of the 1966 Amendment, as the Court construes it.

The Trust Company was chartered in 1889. Its name was changed in 1956 to Nashville Bank & Trust Company. It opened its only branch in 1959. Prior to the change of

ownership in 1964, the controlling interest in the Trust Company had been owned by H. G. Hill, Jr. and his retail grocery chain operating in the Middle Tennessee area. The institution had been operated primarily as a trust company[6] with commercial banking occupying a place of secondary importance. In 1956 it brought in a former railroad executive, W. S. Hackworth, as president and began to emphasize the commercial aspects of its operation. During the period from 1955 to 1964 its assets, deposits and loans more than doubled, and its earnings record was good. This rate of growth, however, leveled off about the year 1960. From that time until the merger with Third National its rate of growth was markedly less than that of any of the other banks in Davidson County. For the period 1956-60 its rate of growth in total asets was 46.55%, a figure which dropped to 20.32% for the period 1960-64. For the same periods the drop in deposits was from 50.58% to 18.77%, and the drop in total loans in discounts was from a percentage gain of 77.57% to 29.86%. Its percentage of total banking business in the market declined from 5.72% on June 30, 1960 to 4.83% on June 30, 1964.

The evidence demonstrates conclusively that the Trust Company, when considered as a commercial bank, has not been an innovator or an aggressive competitor. Its operations have been dominated by unaggressive and ultraconservative management policies. At the time of the merger and for many years prior thereto it had a serious lack of managerial resources due primarily to the fact that

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[6] The Trust Company had created and maintained what was for the most part a good trust department, an aspect of its operations which need not be discussed in detail herein. Trust departments, as the evidence shows, are operated primarily as a service to bank customers and are not an important lever in obtaining commercial business. While there is some direct competition for trust business in the market area between commercial banks having trust departments, such competition is minimal. The greatest area of direct competition for trust business is not with other banks but with individuals, such as lawyers. The loss of a trust account to a competitor bank is of infrequent occurrence.

its salary scale was wholly inadequate and it was without a funded pension plan for its employees. As pointed out by the Comptroller of the Currency in his decision approving the merger on August 4, 1964, "a bank is only as good as its management." At that time the 68 year old bank president was seriously ill and anxious to retire, having an illness which has since caused his death. H. G. Hill, Jr., Chairman of the Board, had sold the controlling stock interest in the Trust Company, owned by his grocery firm, the H. G. Hill Company, to William C. Weaver and associates, and resigned from the bank's board of directors. Kirby Primm, the bank's only full time business solicitor, had resigned and taken a position with the First American National Bank, the largest bank in the market area. All three of these men had been key factors in the growth which the bank had enjoyed during Hackworth's tenure as president, and it is no exaggeration to say that so far as the Trust Company's commercial business was concerned they were practically irreplaceable. Much of the new business was brought to the Trust Company due to the formidable influence and personal business connections of Hill and Hackworth. Primm had been exceedingly resourceful in soliciting new business, particularly in capitalizing upon firms which did business with the Hill grocery stores. The decline in the bank's rate of growth is attributable in large measure to the loss of two of these individuals, to Hackworth's declining health, and to the lack of branch banks and other necessary facilities. In addition, both Hackworth and Primm testified that the Trust Company had reached a plateau and that they had gone as far as they could in bringing in new business by soliciting their friends and business connections. Hackworth described the bank's dilemma as follows:

> The earnings of Nashville Bank and Trust Company in the immediate past have been satisfactory. However, if the Nashville Bank and Trust Company made the expenditures necessary to bring it into a position to compete successfully and substantially in

> the Nashville area banking industry, such as additional branch banks, increased salary scale, automation, funded pension plan, employee welfare benefits and other related modern banking methods and procedures which have come to be necessary in order to render adequate and modern service to the public, it is certain that its pattern of satisfactory earnings could not be maintained and such earnings might very well disappear.

The evidence demonstrates that the Trust Company management problem was one of serious proportions which made it practically impossible to attract and hold competent young men. It is significant that during his 17-year tenure at the Trust Company Primm's salary had increased by only 45% above a very low beginning, and that First American offered him an immediate salary increase of 60%.

The Trust Company's lack of dynamism and aggressiveness is demonstrated in many other ways. There had been no change in department heads from 1946 until the merger in 1964, a situation hardly calculated to interest young managerial leadership. Many of its officers and board members were old and the bank was in serious need of qualified young men as replacements. Although the Trust Company, due primarily to the personal business relationships of Hackworth and Hill, was able to grow substantially during the early years of Hackworth's tenure, no substantial or concerted effort was made to improve or modernize its methods, facilities, attitudes or personnel and management policies. For example, it consistently had the lowest loan to asset ratio of any bank in Davidson County, its loans being confined primarily to real estate and secured loans as distinguished from short term commercial loans. It operated without the benefit of credit files or a credit department. It employed no credit specialists. In consequence it was not able to handle indirect consumer loans or the larger, more complicated credit situations. Its loss experience, particularly in recent years, had not been good. Its emphasis was consistently upon profits rather than

upon making the expenditures necessary to place itself in a posture to be truly and significantly competitive. In addition to inadequate salaries, the lack of a funded pension plan and low fringe benefits, it failed to provide branches, the hallmark of modern banking. It had only one branch as of the date of the merger in the Davidson County market in which there were 52 branch banking offices. Nor did it provide modern equipment, modernized banking quarters, or a continuous audit program. It was not a member of the Federal Reserve system and it had no regular customer call program.

Capital City Bank, on the other hand, which had only begun operations in 1960, and being less than one-fourth the size of the Trust Company, had established three branches. The Comptroller of the Currency was of the opinion that the Trust Company could have established from eight to ten branches in Davidson County if it had so desired. He stated that its failure to branch indicated that it was not disposed to make the needed struggle indicated for growth. Its failure to have any automated or computerized equipment stands in contrast with most other banks of its approximate size in Tennessee. There were many other indicia of negative and unprogressive management policies, including its failure to remedy serious problems in the credit department despite warnings by the FDIC Examiner, its high proportion of criticized loans as reflected in FDIC reports, and its failure to hold any officer staff meetings since 1962.

Considering the Trust Company's problems, deficiencies and weaknesses, it is not difficult to understand the Weaver group's decision to merge with Third National rather than to undertake the formidable task of negotiating another sale, or the even more formidable task of solving the bank's many problems directly. The Weaver group had purchased the controlling stock in the Trust Company in the early part of 1964 as an investment. The members of the group had had no previous banking experience and none of them had planned to become members of the Board

of Directors, or to devote their full energies and resources to rebuilding the bank. Fully realizing the extent of the bank's operational problems and difficulties only after the purchase, and realizing that the bank could not be revitalized as a competitive factor in the market without the expenditure of large sums of money, it was their conclusion that the best solution was to take the merger route.

In view of this attitude on the part of the new management, the Comptroller of the Currency correctly concluded in his decision approving the merger that "when a bank, such as the merging bank, is not disposed to compete, it is idle to speak of the elimination of competition by reason of the merger." Despite its growth record in Hackworth's early years as President, the future prospects of the bank at the time of the merger may be described as unpromising. While there is some conflict, the preponderance of the evidence is that it would have been practically impossible within any reasonable period of time to obtain adequate managerial replacement either from within the bank or from the outside, a product of the bank's failure to have adequate personnel and management policies, of its overly conservative attitudes, and of its failure to make the necessary expenditures to provide itself with the facilities, procedures and equipment required to maintain a competitive posture.

Only a brief word need be said concerning Third National and its position in the relevant market. There is no dispute in the record that it had been a strong, dynamic and aggressive bank since its organization in 1927. It was characterized by the Comptroller of the Currency in his testimony at the trial as one of the strongest and best managed banks in the nation. Of particular significance is the fact that its steady and impressive growth between 1927 and 1964 had been entirely the result of internal expansion, having no prior history of acquision of assets by merger or consolidation. It had, in addition to its main office, some 14 branch offices in Davidson County. It has been active in the correspondent banking field, having approxi-

mately 365 correspondent bank accounts prior to the merger, most of which are located within a radius of 250 miles. Prior to the merger in 1964, it had total deposits of $315,090,000.00 as contrasted with the largest bank, First American National, with deposits of $371,108,000.00, and Commerce Union, the third largest bank, with deposits of $202,624,000.00. At that time the Trust Company had total deposits of $45,471,000.00, occupying fourth place in the market. The fifth largest bank, which had entered the market only four years previously, Capital City, had deposits of $7,266,000.00. The other three banks in the market were the Bank of Goodlettsville with deposits of $6,369,000.00; Citizens Savings with deposits of $3,-053,000.00; and Whites Creek Bank with deposits of $2,603,000.00. After the merger all the Davidson County banks continued a substantial growth. As of June 1965, Third National had total deposits of $375,063,000.00; First American National had $393,040,000.00; Commerce Union had $219,514,000.00; and Capital City had $8,954,000.00. The remaining three banks had increased their combined deposits of $12,025,000.00 before the merger to $13,-590,000.00.

When the general characteristics of the Davidson County market are considered, the plaintiff's insistence that the market is unduly concentrated appears to be lacking in significance. At the time of the merger all of the eight Davidson County banks had combined assets of slightly less than one billion dollars. In such a relatively small banking market it does not appear unreasonable that there should be a concentration of approximately 93% of combined assets in three banking institutions, this figure being approximately 97% after the merger of the Trust Company and Third National. The record contains figures for comparable southeastern markets competitive with Nashville and having three major banks holding between 90 and 100% of the loan and deposit business. For example, Chattanooga has concentration among three banks of 100%; Mobile, Alabama, 98%; Birmingham, Alabama,

93%; Jackson, Mississippi, 98%; Memphis, 91 to 92%. The three largest cities in Tennessee—Memphis, Nashville and Knoxville—are now served by only seven banks, the largest number for any Tennessee city.

A meaningful fact in this case is that the Davidson County banks have attained their present market shares and size through internal growth and not through acquisition, a fact which is in marked contrast with the situation which prevailed in the *Philadelphia* case, as already pointed out. Another distinctive characteristic of the Davidson County market is that it is highly competitive at all levels, a fact which is clearly established by the preponderant testimony of competent and knowledgeable expert witnesses and by objective evidence of low service charges. Rivalry for business has always been exceptionally keen. The ease of entry is clearly indicated by the case of Capital City Bank which entered the market in 1960 and has had a substantial and continued success. There is no evidence of oligopolistic behavior in the relevant market. On the contrary, that the Nashville banks are keenly competitive with respect to service charges, the solicitation of business, and in making changes and innovations is the only fair and reasonable conclusion which can be drawn from the record.

If the *Columbia Steel* factors, relegated to a place of relative unimportance in the *Lexington* case, are considered to have been restored to grace with respect to bank mergers by reason of the 1966 Amendment, and the Court is convinced that they were, and if the present case is accordingly analyzed in terms of such factors, it seems clear that the plaintiff's position in this case cannot be sustained. On the present record, only the *Columbia Steel* factors dealing with size can arguably be said to favor the plaintiff's position. It may be conceded for present purposes that the *dollar volume* and *percentage of business controlled* are significant. But the *strength of the remaining competition* is clearly established in this case by the assets,

deposits and loans of the seven banks in the Davidson County market remaining after the merger, and by competent testimony of bank experts familiar with the market, that the remaining banks were active, vigorous and highly competitive. There is also convincing testimony that the merger has actually resulted in an intensification of competition among the Davidson County banks. Of importance in this connection, as already stated, is the fact that all banks since the merger have had substantial growth. The *motive* for the present merger was not predatory, but was based upon an evaluation of business and economic factors. A merger with Third National was determined to be the best solution to the grave problems confronting the Trust Company at the time of the merger. Without the merger these problems could not have been solved without drastic expenditures over a protracted period of time. Finally, the preponderance of the evidence in this case with reference to the *probable development of the industry, consumer demands* and *other market characteristics,* is highly favorable to the merger. The Davidson County market has had no merger history; there is no trend toward concentration; the service area is rapidly growing with consumer demands being on the increase and the market being recognized as one of the most highly competitive in the nation; the remaining banks are well managed under vigorous and dynamic leadership; the Trust Company had reached a stagnant and deteriorating posture at the time of the merger, having critical managerial and other problems and deficiencies; the new owners were investors who were not disposed to make the sacrifices necessary to overhaul the bank so as to place it in a position to be substantially competitive with other banks; and actual or probable future of oligopolistic behavior is contradicted by the record. This analysis, notwithstanding the concentration and market share figures upon which plaintiff relies, compels the conclusion that the present merger is not a transaction "in restraint of trade" and consequently not prohibited by Section 18(c)(5)(B) of the Federal Deposit

Insurance Act, as amended by the 1966 Amendment, the analogue of Section 1 of the Sherman Act.

Similar considerations lead to the conclusion that the effect of the present merger will not be "substantially to lessen competition or to tend to create a monopoly" in violation of Section 18(c)(5)(B) of the Federal Deposit Insurance Act, as amended by the 1966 Amendment, the analogue of Section 7 of the Clayton Act.

As already stated, no reliable extrapolation as to future prospects may safely be predicated upon concentration or market share figures alone. But considering the totality of facts as to the institutions involved and as to the relevant market, a conclusion that the merger may substantially lessen competition in the future is wholly unwarranted. Any other view would require the Court to close its eyes to facts which are far more convincing than any possible contrary conclusions which could be drawn from the market share or concentration statistics in this case.

The Court concludes that the Comptroller of the Currency's findings, made both before and after the passage of the 1966 Bank Merger Act, that the anticompetitive effects of the merger are minimal and that the merger is not violative of antitrust standards, is supported by the clear preponderance of the evidence in the record. As the Court is also of this view independently of the Comptroller's findings, and concludes that the merger does not violate the antitrust standards of the 1966 Amendment, it is unnecessary to inquire whether any anticompetitive effects are outweighed by the convenience and needs of the community. However, the Court is of the opinion that the preponderance of the evidence supports the Comptroller's finding that the convenience and needs of the community and the public interest will be far better served by Third National Bank with the additional assets which it acquired as a result of the merger than would be the case by maintaining the Trust Company as a separate institution. The Trust Company had simply reached a

period of imminent deterioration. It was at the time of the merger a "floundering" bank, though not a failing one. It was no longer capable under its existing ownership and management, and with its existing facilities, procedures, and attitudes to serve the public on a competitive basis with other banks in the market area. It was more attuned to the Victorian age which gave it birth than to the competitive realities of 20th Century commercial banking.

The Court will presently enter and file with the Clerk detailed findings of fact and conclusions of law to implement and supplement this opinion. Pending such filing, entry of final judgment denying the relief sought by the complaint will be withheld.

/s/ William E. Miller
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI,
EASTERN DIVISION

No. 65C 241 (1)

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

MERCANTILE TRUST COMPANY NATIONAL ASSOCIATION AND SECURITY TRUST COMPANY, *Defendants*.

and

COMPTROLLER OF THE CURRENCY,
JAMES J. SAXON, *Intervening Defendant*.

Memorandum and Order

This matter is before the court on motion to dismiss filed by the defendant, Mercantile Trust Company National Association, and the defendant, Security Trust Company (hereinafter referred to as Banks), and motion to dismiss filed by the intervening defendant, Comptroller of the Currency (hereinafter referred to as Comptroller). The basis for both motions is failure to state a cause of action, and they were submitted to the court after oral arguments and the filing of briefs.

The Justice Department began this action to enjoin a proposed merger of the defendant Banks. The proposed merger had been approved by the Comptroller.

The complaint alleged that the proposed merger would violate Section 1 of the Sherman Act (15 USCA 1) and Section 7 of the Clayton Act (15 USCA 18), and at the same time a motion for a preliminary injunction was filed.

The Comptroller intervened and filed an answer and the defendant Banks answered. All defendants opposed the granting of the preliminary injunction. After a hearing this court denied a preliminary injunction, and the Banks thereafter completed the proposed merger.

On February 21, 1966, while the parties were pursuing discovery, the Bank Merger Act Amendment of 1966 (Public Law 89-356, hereinafter referred to as BMA-66) became law.

On September 13, 1966, the Comptroller reapproved the merger and, in so doing, stated that his reconsideration was for the purpose of complying with the standards of BMA-66.

The plaintiff has not amended its complaint since it was filed. The issue before the court is whether the complaint states a claim for relief against the defendant Banks in view of the passage of BMA-66. The pertinent parts of BMA-66 for the purpose of these motions are as follows:

> "(A) section 18(c) of the Federal Deposit Insurance Act (12 USC 1828(c) is amended to read:
>
> * * * * * * *
>
> "(c) (5) The responsible agency shall not approve—
>
> "(A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or
>
> "(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

"In every case, the responsible agency shall take into consideration the financial and managerial resources and the future prospects of the existing and proposed institutions, and the convenience and deeds of the community to be served.

* * * * * * *

(7) (A) Any action brought under the antitrust laws arising out of a merger transaction shall be com-

menced prior to the earliest time under paragraph (6) at which a merger transaction approved under paragraph (5) might be consummated. The commencement of such an action shall stay the effectiveness of the agency's approval unless the court shall otherwise specifically order. In any such action, the court shall review de novo the issues presented.

"(B) In any judicial proceeding attacking a merger transaction approved under paragraph (5) on the ground that the merger transaction alone and of itself constituted a violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 USCA 2), the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5)."

Section 2(c) of the Bank Merger Act Amendment provides:

"(c) Any court having pending before it on or after the date of enactment of this Act any litigation initiated under the antitrust laws by the Attorney General after June 16, 1963, with respect to the merger, consolidation, acquisition of assets, or assumption of liabilities of an insured bank consummated after June 16, 1963, shall apply the substantative rule of law set forth in section 18(c)(5) of the Federal Deposit Insurance Act, as amended by this Act."

The defendant Banks and the Comptroller admit the plaintiff's complaint when filed stated a cause of action, but contend that since the passage of BMA-66 the plaintiff must amend its complaint to conform to the standards of BMA-66.

The plaintiff takes the position that the Sherman and Clayton Acts are still the only statutes applicable to this suit and that BMA-66 only has an effect upon the Comptroller. The stated purpose of BMA-66 reads:

"An act to establish a procedure for the review of proposed bank mergers so as to eliminate the necessity for the dissolution of merged banks, and for other purposes."

The stated purpose of BMA-66, the text of the act itself, and the legislative history of the act (see U. S. Code and Congressional & Administrative News, pamphlet No. 2, beginning at page 334), all clearly show that the standards set forth in Section 18(c)(5) of the Federal Deposit Insurance Act (12 USCA 1828(c)(5)), as amended by BMA-66, are the standards to be applied by the courts.

Since this court can take judicial notice of a Federal statute, we will not dismiss the complaint merely because it cites the wrong statute.

Under modern notice pleading all that the complaint is required to do is to give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. *Conley v. Gibson,* 355 U. S. 41, 47. A complaint should not be dismissed for insufficiency unless it appears to a certainty that the plaintiff can prove no sets of facts in support of his claim which would entitle him to relief. Id., page 45, and see also Moore's Federal Practice, Vol 2, §12.08, p. 2245. In other words, a motion to dismiss will not be granted if the complaint states a claim for which relief can be granted under any legal theory. In determining the sufficiency of a complaint, material facts, but not unsupported conclusions of the pleader, are considered in the light most favorable to the plaintiff.

If everything in the plaintiff's complaint is taken as true and looked upon in the light most favorable to the plaintiff, can it be said that the plaintiff has sufficiently alleged a violation of BMA-66, thereby giving the defendants fair notice of what the plaintiff's claim is and the grounds upon which it rests? To answer this question we must determine what the nature of an action under BMA-66 is, that is, what grounds constitute a violation thereof.

The language of BMA-66 is clear and unambiguous. In plain language, paragraph 18(c)(5)(B) states, in part, that a proposed merger shall not be approved whose effect is in restraint of trade unless it finds that the anti-competitive effects are outweighed in the public interest by the probable effects of the transaction in meeting the

convenience and needs of the community to be served. Section 2(c) specifically requires this court to apply the standards of 18(c)(5) as amended by BMA-66.

This court will not dismiss a complaint merely because it states the wrong legal theory when the allegations are sustainable under another legal theory, nor will this court require the plaintiff to plead in detail the facts constituting its grounds for relief. However, the most liberal interpretation of the rules of pleading require as an absolute minimum that the plaintiff at least state his grounds for relief and have not gone so far as to permit a pleading to stand which does not even allege a violation of any applicable law or duty.

The complaint does not allege a monopoly, but alleges that the merger may substantially lessen competition and tend to create a monopoly in violation of Section 7 of the Clayton Act. Thus, the complaint only states part of a claim against the defendants required under BMA-66, in that it does not allege a monopoly, nor that the anti-competitive effects of the merger are not outweighed in the public interest by the probable effects of the transaction in meeting the convenience and needs of the community. The plaintiff's complaint does not meet the absolute basic minimum standards of notice pleading in that it has not alleged a violation of BMA-66, the act that applies to all bank mergers, nor has it alleged sufficient facts to support such violation.

The separate motion of defendant Banks and the separate motion of intervening defendant to dismiss are each sustained. Plaintiff is granted twenty (20) days within which to file an amended complaint, and failing to file said amended complaint this cause will be dismissed.

/s/ Roy W. Harper
United States District Judge

APPENDIX H

I

Opinion and Order of December 29, 1966

[CAPTION OMITTED]

CLARY, *Chief Judge:*

This is an action by the United States Government, filed by the Department of Justice (hereinafter referred to as Justice), to enjoin a merger of the Provident National Bank and Central-Penn National Bank of Philadelphia. The complaint was filed on April 1, 1966, the banks answered on April 5, 1966, and the following day the Comptroller of the Currency intervened as a party. Motions to dismiss were filed by the defendants and intervenor, and on October 13, 1966, an Opinion was filed (Docket Paper #34), together with an Order denying the motions. The basis of the Opinion was that, although this action was solely within the ambit of the Bank Merger Act of 1966 (hereinafter referred to as BMA-66), under principles of notice pleading, it was not necessary to specifically plead the BMA-66. Thus, the complaint of Justice filed under Section 7 of the Clayton Act was held valid.

However, in *United States* v. *Mercantile Trust Company National Association, et al.,* Civil Action No. 65C 241 (1), (Eastern District of Missouri, Eastern Division, December 19, 1966), Chief Judge Roy Harper held, on pleadings which are completely similar to the instant case, the following:

> The complaint does not allege a monopoly, but alleges that the merger may substantially lessen competition and tend to create a monopoly in violation of Section 7 of the Clayton Act. Thus, the complaint only states part of a claim against the defendants required under BMA-66, in that it does not allege a monopoly, nor that the anticompetitive effects of the merger are not outweighed in the public interest by the probable effects of the transaction in meeting the convenience

> and needs of the community. The plaintiff's complaint does not meet the absolute basic minimum standards of notice pleading, in that it has not alleged a violation of BMA-66, the act that applies to all bank mergers, nor has it alleged sufficient facts to support such violation.

Judge Harper dismissed the case with privilege to amend within twenty days. In the instant case, with the pleadings complete, the Government has taken an adamant position as hereinafter discussed.

After the Opinion of October 13, 1966, denying the motions to dismiss was filed, further pre-trial proceedings were had, and the Court ordered each side to submit an Identification of Witnesses, Summary of Evidence, and Statement of Position. This the Department of Justice did on November 30, 1966 (Docket Paper #44). In this document Justice stated unequivocally that it intended to prove a violation of Section 7 of the Clayton Act only, without any reference to BMA-66, contending that this was an action under Section 7, and that it was entitled to a determination of the issues on that sole basis. The ruling of this Court was exactly to the contrary.

The defendant banks, upon being served with plaintiff's Identification of Witnesses, Summary of Evidence, and Statement of Position on December 2, 1966, filed a Motion for Final Judgment (Docket Paper #45) with exhibits in support thereof. The Comptroller intervenor filed a Motion for Final Judgment (Docket Paper #46) on December 6, 1966. Thereafter, on December 12, 1966, a conference was held in chambers at which the subject was discussed in depth, a transcript of which hearing is part of the record of this case, and the Court took the matter under consideration. It is these two Motions for Final Judgment which are presently before the Court for disposition.

To date no one has denied the fact that Provident, in the four-county market area designated by the Opinion of the Supreme Court in *United States* v. *Philadelphia National*

Bank, 374 U.S. 371 (1963),[1] controls a definite percentage of the total assets, of the total loans, of the total IPC deposits, and of the total banking offices. Likewise, no one has denied that Central-Penn controls a definite percentage of the total assets, of the total loans, of total IPC deposits, and of the total banking offices doing business in the four-county area. In other words, no one has denied that there will be a concentration of the total of these two percentages of the total assets, of the total loans, of total IPC deposits, and of the total banking offices in the four-county area in the new bank if merged as permitted by the Comptroller of the Currency. Justice says in its Statement of Position that it will prove this and no more. Paying lip service to the ruling of this Court of October 13, 1966, it contends that BMA-66 may have some relevancy, but that this Court is without power to consider in any way the finding of the Comptroller that this merger meets the specifications and qualifications of BMA-66.

This Court has thus been asked by the Government to rule that the banks and Comptroller must present evidence with respect to the merger de novo as if it were being done for the first time; come to its own conclusions independently of the Comptroller and "free of presumptions traceable to anyone"[2] in determining the validity of this merger. The expertise, know-how, direct findings, and conclusions of the Comptroller, the Government contends, are of absolutely no probative value in this Court. In other words, the Government contends that this Court must make an independent decision as to whether the public interest in the merger outweighs any anticompetitive effects. This contention, if considered again, would raise the constitutional question of separation of powers.

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[1] Despite the finding of the District Court that the two banks involved in that case were realistically in competition with banks of other states, the Supreme Court limited its consideration to the case to a four-county area.

[2] Plaintiff's Pre-trial Brief (Docket Paper #16), page 28.

> If the function performed by an agency is "administrative" or "legislative" and if a federal court is required to do all over again what the agency has done, the system of review violates Article III of the Constitution. (Davis Administrative Law Treatise, 1958, Vol. 4, p. 180, §29.10.)

See also the Opinion of Judge Pope in *United States* v. *Crocker Anglo National Bank, et al.*, Civil Action No. 41,808, (District of California, Southern Division, October 6, 1966).

The Court, therefore, finds that since Justice has definitely refused to try its case under BMA-66, the banks should not be subjected to the expense and inconveniece of a trial when Justice refuses to prove other than admitted facts to establish its case. Its position has been taken deliberately and directly in opposition to the ruling of the Court of October 13, 1966, and is consistent with the position of the Government on a nationwide basis, even though the Courts have been unanimous in refusing to accept its contention. *United States* v. *Mercantile Trust Company National Association, et al.*, No. 65C 241 (1), (District of Missouri, Eastern Division, December 19, 1966); *United States* v. *First City National Bank of Houston, et al.*, Civil Action No. 66-H-695, (Southern District of Texas, Houston Division, December 2, 1966); *United States v. First National Bank of Hawaii, et al.*, Civil Action No. 2540, (District of Hawaii, October 31, 1966); *United States* v. *Crocker Anglo National Bank, et al.*, Civil Action No. 41,808, *supra.*

At the hearing on December 12, 1966, Justice also took the position that if the Court should grant the motion of the defendant banks and the intervenor, the Court should, in the exercise of its discretion, continue the statutory stay automatically entered when this suit was filed, taking the position that it was the sole purpose of Congress to halt all mergers after suit was filed until there has been a final determination on the merits. In this instance, it is the Department of Justice alone which has refused to proceed

with trial on the merits of the case under BMA-66. I can read nowhere in the legislative history that it was the intention of the Congress of the United States to hold up mergers indefinitely pending determination of a Department of Justice theory. It appears throughout the legislative history that the Congress was concerned with the problems of divestiture as well as the tremendous expense to the applicant banks when mergers were unduly delayed, and that stay should be granted only when the Government, through the Department of Justice, in good faith proceeded promptly to a trial on the merits. This Justice refuses to do by its intransigent position of the applicability of Section 7 of the Clayton Act only. It is, therefore, the decision of this Court that it will not stay the merger, except for a relatively short time to permit Justice to take such further action as it sees fit. A time lag, even of the statutory time for appeal, at the present time, might destroy the efficacy of the merger because of mounting expense.

The Court, therefore, enters the following

ORDER

And now, to wit, this 29th day of December, 1966, upon consideration of defendant banks' Motion for Final Judgment (Docket Paper #45), Motion of Intervenor for Final Judgment (Docket Paper #46), the entire record of the case, including briefs, hearings, and arguments, it is Ordered, Adjudged and Decreed:

1. That the complaint in this case be and it is hereby Dismissed with prejudice;

2. That the statutory stay of the merger is Lifted and the banks may merge at a time to be determined by them, but not earlier than January 18, 1967.

By the Court:

Thomas J. Clary,
Chief Judge.

II

Oral Decision, November 4

Before Hon. THOMAS J. CLARY, Chief Judge.

The first question to be resolved is how much weight is to be given to the findings of the Comptroller. In the recent case of *U.S.* v. *Crocker Anglo National Bank* the Court, in answer to this question, declared its intention to apply the substantial evidence test to the Comptroller's public interest findings, calling the "convenience and needs" test of BMA-66, Section 5(B) non-judicial in character. Yet, *Crocker* would also apply the substantial evidence test, with less vigor, to the Comptroller's findings on competition.

Crocker, however, is distinguishable from the case at bar, and it is distinguishable on one fact. In *Crocker* the findings of the Comptroler were based on a public, evidentiary hearing which produced 1,605 pages of testimony and exhibits. There was no such hearing in the instant proceeding. Therefore, although the *Crocker* holding rules the instant case as a Court review of an agency decision, the question of scope of review comes under the rule of *First National Bank of Smithfield, North Carolina* v. *Saxon*, 352 F. 2d 267 (4 Cir. 1965).

Smithfield involved a branch bank approval under 12 U.S.C. Section 36 in which the Comptroller approved a new branch without a hearing. The Court first held that a hearing was not required because 12 U.S.C. Section 36 made no provision for one. A hearing is only required when expressly directed by the empowering statute. Then, after this determination, the Court declared that weight is only to be given to the Comptroller's decision if after a Court hearing in law and in fact it is found that his decision rested on an exercise of discretion. This is because the Court will not substitute its discretion for the Comptroller's.

This Court finds *Smithfield* to be analogous to the instant case. The BMA-66, like 12 U.S.C. Section 36, has no requirement for a hearing before the Comptroller, thus allowing the Comptroller to act at his discretion. However, when there is no hearing, it cannot be contended that the findings of the Comptroller should be given the weight of hearing based findings.

The basis for this conclusion is best seen in the following quote from *Smithfield:*

> "We have said the Comptroller did not act arbitrarily in not allowing a hearing. However, a necessary consequence of his unilateral procedure is that the facts on which the Comptroller presumably acted should not be given the preferred position accorded by the substantial-evidence rule. The rule would declare them indisputable if some reasonable basis for them may be found in the evidence. Applied here, the plaintiff would be bound by evidence offered in a proceeding in which it was not heard. Hence, there is no place in the review for an opening-presumption of correctness of any fact which it may appear to the Court was adopted by the Comptroller for his decision.

The substantial evidence rule, therefore, may be invoked only when a proper foundation is laid for it as was done in *Crocker*.

Therefore, the Court will hear all evidence in law and in fact, and if after it has made its findings, it then appears that the decision of the Comptroller is dependent on an exercise of discretion, the Court will bow to that discretion. However, if from the fact findings, it appears that the Comptroller abused, exceeded, or arbitrarily applied his discretion, the Court will set it aside.

The other question requiring answer is how is the burden of proof to be allocated? However, this Court's decision that Justice's only action lies within the ambit of BMA-66 allows only one solution. The allocation is as follows:

Justice must prove a violation of BMA-66, Section 5(B). To show this violation, Justice has to prima facie establish (1) that there are anticompetitive effects, as defined in Section 5(B) and (2) that these anticompetitive effects are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. Only such a showing will make out a case for violation of BMA-66. Proof of anticompetitive effects solely is no longer controlling. A merger may be anticompetitive and yet be legal because it promotes the public interest as set forth in the Act. Therefore, for Justice to show illegality, it must prove first that a merger is not only anticompetitive, but also prima facie that it is not in the public interest.

If and when Justice establishes such a prima facie violation of BMA-66, the burden of producing evidence will shift to the Banks and the Comptroller to counter the Justice Department's proof.

Once the Banks and Comptroller have presented their case, Justice will be given an opportunity to rebut such matters as are raised by the Banks and Comptroller in regard to the convenience and needs test. In any event, however, Justice has the overall burden of persuasion to show the illegality of the merger.

III

Opinion and Order of October 13, 1966

[CAPTION OMITTED]

CLARY, *Chief Judge:*

On December 6, 1965, the Central-Penn National Bank of Philadelphia and the Provident National Bank of Philadelphia applied to the office of the Comptroller of the Currency for permission to merge under the charter of the Central-Penn National Bank and with the title of Provident National Bank. The report by the Board of Governors of the Federal Reserve System to the Comptroller of the

Currency under Section 18(c) of the Federal Deposit Insurance Act on the competitive factors involved in the proposed merger dated January 7, 1966, was that "the overall effect of the proposed merger on competition would be significantly adverse." On the same day, the Attorney General of the United States reported, "There are strong reasons, therefore, for believing that the proposed merger would have an important adverse effect on competition within the Philadelphia banking market * * * the anticompetitive effects of this merger are important and considerable and there are likely to be no redeeming features." The Federal Deposit Insurance Corporation filed no comment.

On March 4, 1966, the Comptroller of the Currency approved the merger, and on March 31, 1966, filed his written decision in respect thereof. In that decision the Comptroller noted that this application to merge was the first filed by banks of significant size to be acted upon by his office since the passage of the 1966 Amendment to the Bank Merger Act. He stated, "The new law, passed by Congress to moderate the decisions of the Supreme Court in *U.S.* v. *Philadelphia National Bank, et al.*, 374 U.S. 321 (1963) and *U.S.* v. *Lexington*, 376 U.S. 665 (1964), recognizes that traditional antitrust concepts cannot be applied to banking without substantial modification." His findings then followed sustaining the merger.

On April 1, 1966, the present action brought by the United States of America against Provident National Bank and Central-Penn National Bank of Philadelphia, defendants, was filed to enjoin the merger. On April 7, 1966, James J. Saxon, Comptroller of the Currency, intervened and thus is a party to the action, as provided by Section 1828(c)(7)(D) of Title 12, United States Code. Since under the provisions of the afore-quoted Section 1828 of Title 12 a novel situation has been brought about wherein two departments of the Executive Branch of the Government are litigating one against the other, with the approval of the

Congress of the United States, it will be necessary to delineate in this Opinion to which branch of Government is being referred. Consequently, for the purposes of this Opinion, the plaintiff hereafter will be referred to as "Department of Justice" or "Justice"; the defendant Provident National Bank as "Provident"; the defendant Central-Penn National Bank of Philadelphia as "Central"; the joint defendants as "Banks"; the Comptroller of the Currency as "Comptroller" or "Intervenor", and the Bank Merger Act, Public Law 89-356, 64 Stat. 892, will be referred to as "BMA-66". The stated purpose of the aforesaid Act, as set forth in the slip sheet publication reads as follows:

> To establish a procedure for the review of proposed bank mergers so as to eliminate the necessity for the dissolution of merged banks, and for other purposes.

The pertinent pleadings to date which are essential to a decision on the present motions consist of a complaint filed by Justice, a joint answer filed by the Banks, the order permitting intervention of James J. Saxon, Comptroller of the Currency, answer of the Comptroller, motion of the Comptroller to dismiss, and motion of the Banks to dismiss. The basis for each of the motions to dismiss is that the complaint "fails to state a claim upon which relief can be granted."

There is no question that a law suit was started by Justice to enjoin the merger before the thirtieth calendar day after the date of approval by the agency (March 4, 1966). Thus, Justice has met the fundamental requirement of BMA-66, Title 12, Section (c)(7)(A), which prohibits any litigation challenging the merger after the thirtieth calendar day following approval. Justice has met the statutory limitation of action in that regard. A reading of the complaint leaves no doubt that Justice intended to plead, and did plead, a case of antitrust violation strictly in accordance with Section 7 of the Clayton Act (15 U.S.C., Section 18) and has attempted to ignore completely BMA-66. There

are too many pointed references in the complaint challenging all alleged violations of antitrust law as contravening Section 7 of the Clayton Act only. Justice bottoms its case on the decision of the Supreme Court in *U.S.* v. *Philadelphia National Bank, et al.*, 374 U.S. 321 (1963). It is this specific pleading of Justice charging a violation of Section 7 which is relied upon by the Banks and the intervening Comptroller in their motions to dismiss. The Banks and Comptroller insist that a Section 7 action is no longer available to Justice in a merger or consolidation of the type involved in the instant case, and that any actions must be grounded in BMA-66 and no other statute in the light of the wording of BMA-66. The Banks and Comptroller urge that since Justice has failed to ground its action in a challenge under BMA-66 within the thirty day period, and that since such failure is substantive rather than procedural, the limitations contained in BMA-66 are applicable, that the Court is thus without jurisdiction, and the action must be dismissed. In plain language they insist that Justice has deliberately sought to avoid any requirements contained in BMA-66 which deletes "line of commerce" and adds another facet to the standards governing bank mergers, i.e., if anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served, the agency in question is authorized to approve a proposed merger. This intransigence of Justice, they contend, is substantive, not procedural, and thus fatal to the position of Justice.

The weakness of the contentions of the Banks and of the Comptroller lies in the fact that we are now only at the notice pleading stage. The complaint specifically charges that the history of commercial banking in the four-county area of Philadelphia, has been one of consolidations, mergers and acquisitions, with a heavy concentration of the business of commercial banking within a relatively few

banks; that Provident controlled 9% of the total assets, 9% of the total loans, 9% of the total PIC [sic] deposits, 10% of the total IPC demand deposits, and 9% of the banking offices doing business in the four-county area; that Central-Penn, the sixth largest commercial bank in the four-county area, controlled 5% of the total assets, 5% of the total loans, 5% of the total IPC deposits, 5% of the total IPC demand deposits, and 6% of the banking offices doing business in the four-county area; that Provident is the product of seven mergers or consolidations since 1947, and Central-Penn is the product of six such mergers or consolidations since 1949; that the proposed merged bank would be the fourth largest bank in the area, controlling 14% of the total assets, 14% of the total loans, 14% of the total IPC deposits, 15% of the total IPC demand deposits, and 15% of the banking offices of 36 banks doing business in the four-county area. Also, Justice contends that after the proposed merger, the five largest banks in the area would control 78% of the total assets, 79% of the total loans, 76% of the total IPC deposits, 77% of the total IPC demand deposits, and 63% of the banking offices of 36 banks doing business in the area; that it would destroy competition between each other and other banks, and that it would substantially lessen competition or tend to create a monopoly. It also charges that competition generally in the commercial banks in the four-county area will be substantially and unreasonably lessened, and that concentration in commercial banking in the four-county area will be substantially and unreasonably increased.

It cannot be gainsaid that if Justice had seen fit to plead generally and without reference to any particular statute, instead of specifically proceeding under Section 7 of the Clayton Act, and these factors pleaded might result in a violation of antitrust laws, the Court would of necessity have to hear the case. The only question for decision then is, does the reference solely to Section 7 invalidate the

cause of action filed by Justice? For reasons hereafter set forth, this Court decides that it does not.

The purpose of notice pleading is merely to inform opposing parties what such opposing parties have to meet and defend. Justice charges a violation of antitrust laws, despite its insistence upon Section 7. Thus, suit is brought under antitrust laws of the United States.

The reference to a statute as being the basic ground upon which an action is brought, even if completely incorrect, is no ground for the dismissal of an action where there is a statute in existence which would warrant a valid cause of action for which relief could be granted upon the facts as pleaded. *Missouri K & T.R. Co.* v. *Wulf,* 226 U.S. 570 (1913). This case involved a complaint based upon a state statute which had been repealed by the enactment of a federal statute not mentioned in the complaint. Mr. Justice Pitney, writing for the Court, held that the Court was presumed to be cognizant of the enactment and that the pleader was not required to refer to the federal act. He further stated that reference to the state statute no more vitiated the pleading than a reference to any other repealed statute would have done. It was only important that there were sufficient allegations to support an action under the new federal act.

The modern theory of notice pleading is one of even greater liberality, thus bolstering the decision reached in *Missouri K. & T. R. Co.* v. *Wulf, supra.* Today, the basic principle is that pleadings are no longer to be held to the rigid standards of the common law and neither absolute clarity nor absolute precision is required. *United States* v. *Crown Zellerbach Corporation,* 141 F. Supp. 118 (N.D. Ill. 1956). It is enough to sustain a pleading against a motion to dismiss that a defendant is informed with reasonable particularity of a legally cognizable claim against him. If the plaintiff could recover on any state of facts, which it might prove in support of its allegations as laid, a motion to dismiss will be denied. *Conley* v. *Gibson,* 355 U.S. 41 (1957); *Melo-Sonics Corporation* v. *Cropp,* 342 F. 2d 856

(3 Cir. 1965); *Fuller v. Highway Truck Drivers & Helpers Local 107*, 233 F. Supp. 115 (E.D. Pa. 1964); *Miller v. Bargain City, U.S.A. Inc.*, 229 F. Supp. 33 (E.D. Pa. 1964).

Therefore, today the legal averments of a pleading are not so important as long as there are allegations which, if proved most favorably to plaintiff, would permit recovery under the laws of the United States. If, in such a complaint, there also appears a reference to an irrelevant statute, or if no statute is mentioned, the Court need only take judicial notice of the relevant statute. As stated in *Buell v. Sears, Roebuck & Co.*, 321 F. 2d 468 (10 Cir. 1963), it is not necessary to plead what may be judically noticed. And, it is hornbook law that federal acts are a proper subject for judicial notice.

There is a further principle of pleading which has been recognized in federal procedure since *United States v. Morris*, 23 U.S. 246, 6 L. Ed. 314 (1825), that a subsequent pleading of an adversary, if not thereafter denied, may cure a defect in a prior pleading. *Cole v. Ralph*, 252 U.S. 286, 40 S. Ct. 321, 64 L. Ed. 567 (1920); *Albertson v. Federal Communications System*, 87 U.S. App. D.C. 39, 182 F. 2d 397 (1950); *Bullen v. DeBretteville*, 239 F. 2d 824 (1956). This principle applies to substantive as well as procedural omissions.

In the first defense of their answer, defendants claim that any action lies only under BMA-66. In their second defense, the defendant Banks put into controversy the question as to whether all right of Justice to enjoin the merger is vested in BMA-66. The answer of the Comptroller likewise puts into controversy the Bank Merger Act of 1966 by its prayer for relief.

We have long passed the stage peculiar to common law pleading that a failure in form of pleading vitiates the entire proceeding. This is an important case to all and is not a private quarrel between two branches of the Executive Department. The Congress of the United States has, for the first time, permitted two co-ordinate branches of

the same department of Government to litigate opposite views in a judicial proceeding, thus affording one department of the Executive Branch, aggrieved by an alleged arbitrary position of the Department of Justice, to properly present for the first time before the Judicial side of the Government its contention when it is in violent disagreement with the Department of Justice. While quite novel, in view of increasing differences between departments of Government, the provision is undoubtedly necessary.

In denying the motions to dismiss at this time, the Court does not sustain the position of Justice that it is entitled to sue under Section 7 of the Clayton Act. The only suit open to Justice to enjoin a bank merger lies solely within the ambit of BMA-66. It is not necessary at this time to decide the question of burden of proof, whether on Justice or on the Comptroller and Banks. That will be ruled upon in later pre-trial procedures.

ORDER

And now, to wit, this 13th day of October, 1966, for the reasons set forth in the foregoing Opinion, it is Ordered, Adjudged and Decreed that defendants' Motion to Dismiss and intervenor's Motion to Dismiss be and they are hereby Denied.

By the Court:

Thomas J. Clary,
Chief Judge.

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IN THE

Supreme Court of the United States

October Term, 1966.

No. 972.

UNITED STATES OF AMERICA,
Appellant,

v.

PROVIDENT NATIONAL BANK, CENTRAL-PENN NATIONAL BANK OF PHILADELPHIA, AND WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY,
Appellees.

BRIEF OF APPELLEE BANKS.

QUESTIONS PRESENTED.

Under the Bank Merger Act of 1966, a bank merger may be approved, even though it would otherwise violate the Clayton Act, if the regulatory agency finds that the anticompetitive effects are clearly outweighed in the public interest by the effects of the merger in meeting the convenience and needs of the community. Once this finding has been made, the merger is immune from attack except during a 30-day period. In any action brought within that period, the court is directed to "review de novo the issues presented" and to apply the identical standards that the banking agencies are directed to apply.

This appeal arises out of an action in the District Court attacking a bank merger approved by the Comptroller of the Currency. The questions presented are:

1. Is the function of the court to review the Comptroller's finding of public interest—as the court below held—or to make its own determination independent of the Comptroller's finding—as the Department of Justice contends?

2. Is the determination of public interest under the Bank Merger Act a legislative function which cannot constitutionally be assigned to a federal court?

3. Does the Department of Justice have the burden of persuading the court that, in the light of the facts as found by the court, the Comptroller has abused, exceeded or arbitrarily applied his discretion?

4. Does the Department of Justice have the burden of coming forward with evidence that any anticompetitive effects are not outweighed by the factors of community convenience and needs relied upon by the Banks and found by the Comptroller to justify the merger?

STATUTE INVOLVED.

The Bank Merger Act of 1966, 80 Stat. 7, (reprinted in full in Banks' Appendix 1b-7b) amends Section 18(c) of the Federal Deposit Insurance Act, 12 U.S.C. § 1828(c) to provide that:

(a) No insured bank shall merge with another except with the approval of the responsible agency (Subsection 2).

(b) In deciding whether to approve a merger, the agency shall consider in every case the financial and managerial resources and future prospects of the banks and the convenience and needs of the community to be served (Subsection 5).

(c) The agency shall also request advisory reports from the other banking agencies and the Attorney General as to the competitive factors—but not the community convenience and needs—involved in the merger (Subsection 4).

(d) The agency shall not approve a merger whose effect may be substantially to lessen competition unless it finds that the anticompetitive effects are clearly outweighed in the public interest by the merger's probable effects in meeting community convenience and needs (Subsection 5).

(e) After the merger has been approved, it cannot be attacked in a proceeding under the antitrust laws except during the 30-day period following the approval. In any such proceeding, the agency may appear as a party as of right (Subsections 7(A), 7(C) and 7(D)).

(f) The court is directed to "review de novo the issues presented" and to apply the "identical" standards the agency was directed to apply (Subsections 7(A) and 7(B)).

STATEMENT.

History of the Case.

The history of this case can be said to begin with the enactment of the Bank Merger Act of 1960,[1] which was passed by Congress:

> "to provide for control of all mergers by asset acquisition by banks under the jurisdiction of the Federal banking agencies, under uniform and clear standards calling explicitly for consideration of both banking factors and competitive factors, but without giving sole and controlling effect to any single factor." Senate Report No. 196, 86th Cong., 1st Sess. p. 1 (1959).

The 1960 Act required the bank regulatory agencies to consider the capital and earnings prospects of the banks, "the convenience and needs of the community to be served," and the possible effect of the proposed merger on competition. The Act specified that the agency should not approve the merger "unless, after considering all of such factors, it finds the transaction to be in the public interest." The Act did not provide for a review by the courts or set forth the standards to be applied by the court in any proceeding attacking the merger.

In 1961, the Department of Justice sued under the antitrust laws to restrain the merger of Philadelphia National Bank and Girard Trust Corn Exchange Bank, which had been approved by the Comptroller under the 1960 Act. The District Court found for the defendants. This Court reversed, finding the merger (which would have created the largest bank in Philadelphia)[2] to be in violation of Section

1. 74 Stat. 129 (1960).

2. The bank resulting from the PNB-Girard merger would have held 36% of the bank assets in the Philadelphia area and would have been half again as large as its nearest competitor. In contrast, the bank resulting from the present merger will be the fourth largest in Philadelphia, holding about 15% of the area's bank assets.

7 of the Clayton Act. *U. S. v. Philadelphia National Bank*, 374 U. S. 321 (1963). The Court noted the arguments of the defendants that Philadelphia needs a large bank to bring business to the area and stimulate its economic development, but said that it could not consider these arguments because they were not relevant to the issues under the Clayton Act.

> "We are clear, however, that a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended § 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid." (*Id.* at 371)

The effect of *Philadelphia National* was that, in a suit attacking a bank merger under the Clayton Act, the court could not take into account the bank regulatory agency's finding of public interest under the Bank Merger Act of 1960. The Bank Merger Act of 1966 was intended to change this result and to permit—and indeed require—the courts to consider the public interest just as the regulatory agencies are required to do. The 1966 Act establishes a more precise and rigorous standard for the agencies, permitting them to approve an anticompetitive merger *only* if the anticompetitive effects are clearly outweighed in the public interest by the convenience and needs of the community to be served. To solve the problem posed by *Philadelphia National*, i.e., the problem of the different standards to be applied by the agency under the Bank Merger Act and the court under the Clayton Act, the new Act further provides

that if an approved merger is attacked in court, the court shall apply the "identical" standards which the agency is directed to apply (Banks' Appendix 4b).

The instant case involves the first merger approved by the Comptroller and the first action instituted by the Department of Justice under the new Act. The court below entered final judgment in the nature of a directed verdict dismissing the complaint with prejudice because the Department of Justice refused to try the case in accordance with the court's construction of the Act. The steps leading to this judgment were as follows:

1. On December 6, 1965, the Appellee Banks filed with the Comptroller of the Currency a merger application containing a fifty-page Economic Brief and supporting exhibits (Banks' Appendix 8b-73b). These papers set forth the Banks' contention that the merger will have no adverse effect on competition. They also show that the merged bank will better serve the convenience and needs of the Philadelphia community.

2. On March 4, 1966, after considering the Banks' application, the advisory reports as to competitive factors received from the Federal Reserve Board and the Attorney General (Banks' Appendix 76b, 88b), extensive supplementary material filed by the Banks, and the reports of the regional Comptroller and bank examiners, the Comptroller announced his approval of the merger. On March 31 he issued his decision (Banks' Appendix 93b-112b). He found that "the competition which would be eliminated by this merger is miniscule," and that, on the contrary, "the climate of competition would be stimulated by the increased capacity of a large scale bank, and the range of choices available to customers who require services which can only be rendered by a larger bank would be increased" (*Id.* 110b). He further found that the convenience and needs of the Philadelphia community would be served through the merger "by increased efficiency, by a greater lending

capacity, through more adequate banking quarters, and by a generally improved quality of banking services. . . ." (*Id.* 111b). He further found that the merger "clearly conforms to the statutory criteria" of the Bank Merger Act of 1966 and that "We would be hindering the economic growth of Philadelphia if we failed to give our approval to this merger application" (*Id.* 112b).

3. On April 1, 1966, the Department of Justice filed its complaint seeking an injunction under Section 7 of the Clayton Act.[3] Shortly thereafter the Comptroller intervened.

4. On June 7, 1966, the court entered Pre-Trial Order No. 1, directing the parties to file pre-trial briefs setting forth the facts they expected to prove and their contentions as to the legal issues, including contentions as to burden of proof (Banks' Appendix 118b). In response to this direction, the parties stated their views regarding the function of the court as follows:

(a) The Department of Justice, in its pretrial brief, took the position that this case "is *United States v. Philadelphia National* all over again, only that the names have been changed" (Plaintiff's Pretrial Brief ¶ 117). The Department contended that the function of the court is to try the case de novo "as though no previous action had been taken." (*Id.* ¶ 81). In the Department's words, the court "makes a fresh start and comes to its own conclusions independently of the Comptroller and free of presumptions traceable to anyone." (*Id.* ¶ 80).

(b) The Banks, in their pretrial brief, stated their contention as to the function of the court as follows:

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3. On October 13, 1966, the court entered an order denying motions by the Comptroller and the Banks to dismiss the complaint for failure to state a cause of action under the Bank Merger Act (Banks' Appendix 192b). That order is not at issue in this appeal.

"The task of this Court under the Bank Merger Act of 1966 is to 'review' the decision of the Comptroller of the Currency. It hears the evidence 'de novo' (unavoidably since there was no hearing held before the Comptroller), but the judgment it must make is whether the Comptroller acted within the bounds of the discretion entrusted to him by the Bank Merger Act of 1966, not whether the Court approves of the merger and not whether the merger would violate Section 7 of the Clayton Act. In no other way can the Act be construed constitutionally since administrative determinations regarding the community needs for improved banking services and the effects of the merger in meeting these needs do not present a case or controversy within the judicial power under the Constitution. In no other way can the Bank Merger Act of 1966 be construed consistently with Congress' reiterated intent to vest authority in the bank regulating agencies to authorize mergers consistent with the public interest where public interest considerations clearly outweigh any visible impairment of competition." (Banks' Appendix 122b)

(c) The Banks' pretrial brief also outlined the Banks' case on competition and set forth in detail the facts the Banks would prove to show that the merger will serve the public interest (Banks' Appendix 140b-168b). The Plaintiff's reply brief took no issue with these facts.[4]

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4. The reply brief said that the Department "is not in a position to inform this Court whether plaintiff believes the conclusions reached [in the Banks' pretrial brief] are correct or not" (Plaintiff's Reply Brief ¶ 21). Under Pre-Trial Order No. 1, any issues, contentions or claims not set forth in the pre-trial briefs are to be deemed "abandoned, uncontroverted, or withdrawn" (Banks' Appendix 119b).

5. On October 26, 1966, the court, having received these conflicting views of the parties as to its function, ordered argument on the questions of burden of proof and the weight to be given to the Comptroller's decision. On November 4, after hearing argument, the court, in an oral opinion (Banks' Appendix 199b), adopted the Banks' view —i.e., that the function of the court is to review the decision of the Comptroller. The court ruled that the plaintiff has the burden of persuasion to show the illegality of the merger and the burden of coming forward with the evidence. The Department of Justice was ordered to show that the anti-competitive effects claimed by the Department are not outweighed by the factors of public interest, convenience and need which have been specified by the Banks and evaluated by the Comptroller.

6. The Department of Justice made no effort to obtain review of the court's order of November 4. Instead, on November 26 the Department filed its Indentification of Witnesses, Summary of Evidence and Statement of Position (Banks' Appendix 202b), in which it stated, in effect, that it would decline to comply with the November 4 order. The Statement of Position said: ". . . plaintiff does not intend, in establishing a prima facie case, to offer proof either of the existence or the significance of 'convenience and needs' factors, if any there may be" (*Id.* 213b).

7. On December 2, by reason of the Department's "Statement of Position," the Banks filed a motion for final judgment such as is entered under Rule 41(b) after completion of the plaintiff's case if the plaintiff has shown no right to relief (Banks' Appendix 214b). On December 29, the court entered final judgment for the Banks (Banks' Appendix 269b; *U. S. v. Provident National Bank et al.,* Trade Reg. Rep. (1967 Trade Cas.) ¶ 71,985 (E. D. Pa., December 29, 1966)).

Opinion Below.

The Department of Justice contended below, as it contends here, that the District Court must independently determine whether the public interest in the merger outweighs any anticompetitive effects. The court below rejected this contention for two reasons: first, the contention would nullify the expertise, know-how, direct findings and conclusions of the regulatory agency; second, it would violate the constitutional separation of powers (Banks' Appendix 271b, 272b).

In so construing the Bank Merger Act, the court below followed a ruling by the three-judge court which is trying the San Francisco bank merger case: "It is plain to us that the congressional purpose here was to provide for an initial decision by the Comptroller and that the action brought by the Department of Justice should be deemed an action to review that decision. It is noteworthy that the section of the statute which uses the term 'de novo' does not speak of a trial de novo but of a *review* de novo." *U. S. v. Crocker-Anglo National Bank, et al.*, Trade Reg. Rep. (1966 Trade Cas.) ¶ 71,898 at 83,156 (N. D. Cal., October 6, 1966).

The California court, like the court below, based its decision on the constitutional separation of powers, saying:

> ". . . the problem of reviewing the second determination by the Comptroller, namely, whether the proposed transaction is outweighed in the public interest, and whether it meets the convenience and needs of the community, is plainly and unquestionably a legislative or administrative determination of a type which this court, as a constitutional court, is prohibited from deciding." *Id.* at 83,154.[5]

5. This holding in *Crocker-Anglo* was cited and followed by the District Court for the Middle District of Tennessee in *U. S. v. Third National Bank of Nashville*, 260 F. Supp. 869, 873, 874 (1966). Three other District Courts have taken essentially the same view in

Having established that its function is to review the Comptroller's decision, the court below assigned to the Department of Justice "the overall burden of persuasion to show the illegality of the merger" (Banks' Appendix 201b). This is the normal burden of persuasion undertaken by any plaintiff or petitioner seeking review of an administrative decision.

However, normal review proceedings involve only the burden of persuasion. There is no occasion to consider the burden of coming forward with evidence because the review is made on the record before the administrative body and is governed by the substantial evidence rule. In the instant case, the court below rejected the substantial evidence rule because the Comptroller did not hold a hearing. The court below said:

> ". . . when there is no hearing, it cannot be contended that the findings of the Comptroller should be given the weight of hearing based findings." (Banks' Appendix 200b)

The court below then set forth the procedure which it would follow in reviewing de novo the issues presented:

> "Therefore, the Court will hear all evidence in law and in fact, and if after it has made its findings, it then appears that the decision of the Comptroller is dependent on an exercise of discretion, the Court will bow to that discretion. However, if from the fact findings, it appears that the Comptroller abused, exceeded, or arbitrarily applied his discretion, the Court will set it aside." (Banks' Appendix 200b)

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holding that the Department of Justice has the burden of pleading on the issue of public interest: *U. S. v. First National Bank of Hawaii, et al.*, Civ. No. 2540, D. Hawaii, 1966 (oral opinion of October 31, 1966, unreported); *U. S. v. First City National Bank of Houston*, before this Court on appeal at No. 914, October Term, 1966; and *U. S. v. Mercantile Trust Company, et al.*, 1966 BNA Antitrust and Trade Reg. Rep. No. 286 (1/3/67) page X-6 (E. D. Mo. December 19, 1966).

The Court assigned to the Department the burden of coming forward with evidence on the factual issues relating to public interest, as well as anticompetitive effects (Banks' Appendix 201b).

The procedure and scope of review prescribed by the court below are the same as those prescribed by the Fourth Circuit Court of Appeals in *First National Bank of Smithfield, North Carolina v. Saxon*, 352 F. 2d 267 (1965). The *Smithfield* decision described this procedure as a "review de novo" (*Id.* at 273).

Convenience and Needs and the Public Interest.

The basis for the decision below was that the determination of public interest under the Bank Merger Act is a legislative or administrative function which the court is not equipped to perform and which the Constitution does not permit the court to undertake. The considerations of community convenience and need in this case (as set forth in the Banks' economic brief filed with the Comptroller and the Banks' pretrial brief and outline of testimony filed with the court below) are illustrative of the administrative policy and expertise which are necessarily involved in evaluating the public interest in any bank merger. In brief, they are as follows:

1. The merger of Provident and Central-Penn is a step in the evolution of the banking structure in Philadelphia. The principal factors in that evolution have been the development of full service banks able to provide complex and sophisticated financial services, the development of retail branch systems to make these services available to individuals and small businesses in the Philadelphia metropolitan area, and the development of methods for making these services available to country correspondent banks and their customers throughout Eastern Pennsylvania and the nearby states. The merger will further all three of these developments in that the merged bank will provide

improved services, will make them available within the Philadelphia community through a more widely based branch system, and will also be better able to serve its correspondents and their customers in a very much larger community (Banks' Appendix 29b-34b, 144b-155b, 222b-240b).

2. The merger of Provident and Central-Penn must also be viewed in relation to the broader evolution of banking. The money market in which banks operate is becoming more national and international.[6] Philadelphia is part of a developing megalopolis stretching from Boston to Washington. Foreign banks are operating in this country. Larger United States banks are increasing their offices and investments abroad. Only the larger banking units can take advantage of the potentialities of automation and computerization for efficiencies in operation and improvements in service. Their services benefit small customers as well as large. Indeed, the smaller customer (including a smaller bank) may have greater need for the specialized services provided by larger banks because he lacks the resources to provide these services for himself (Banks' Appendix, 140b-141b, 226b-229b, 251b-252b).

3. Banks in a metropolitan area such as Philadelphia fall into two groups for Federal Reserve purposes: reserve city banks and country banks.[7] In Philadelphia, the coun-

6. The Comptroller pointed out that "money, either in the form of savings, deposits, or credits, moves with great ease and rapidity; its flow is not impeded by political boundary lines" (Banks' Appendix 94b, 95b).

7. The two classes differ in the amount of reserves required to be maintained against demand deposits, the requirement being currently 16½% for reserve city banks and 12% for country banks, 12 CFR § 204.5 as amended; 31 Fed. Reg. 15,793 (December 8, 1966). In addition, many of the country banks in the Philadelphia area are state banks and not members of the Federal Reserve System. As nonmembers, they can invest up to 40% of their reserves in income producing obligations, whereas member banks must maintain their reserves in the form of vault cash or as non-interest

try banks operate almost entirely at the retail level; i.e., they serve mostly individuals and local or regional businesses. The reserve city banks operate at the wholesale as well as the retail level; that is, in addition to their retail business, they do a substantial volume of business with large corporations and financial institutions operating in the national money market and also serve numerous correspondent country banks over a wide area. It is the reserve city banks which compete in the developing national and international markets and which, in general, provide the most sophisticated financial services for their own customers and those of their country correspondent banks (Banks' Appendix 55b-57b, 144b-149b, 154b-156b, 226b-227b, 248b-249b, 251b-252b, 254b).

4. There are in the Philadelphia four-county area six reserve city banks and 31 country banks. Central-Penn is the smallest of the reserve city banks—less than one-quarter the size of the largest bank. It is also smaller than the largest of the country banks. Provident is the second smallest reserve city bank—less than half the size of the leader. The merged bank will be the fourth largest in the City. It will be about two-thirds the size of the leader and three-quarters the size of the second bank (Banks' Appendix 183b-191b, 141b-142b, 161b).

5. More than 50% of Central-Penn's deposits and 60% of its loans are in the national market as defined in *U. S. v. Manufacturers Hanover Trust Co.*, 240 F. Supp. 867, 921 (S. D. N. Y. 1965). The corresponding figures for Provident are 60% and 70% (Banks' Appendix 166b-168b, 178b-182b). Thus, the principal effect of the merger will be to consolidate the national segments of the Banks' business and provide a broader base and larger volume of

bearing balances with the Federal Reserve Bank. They also, unlike member banks, can consider uncollected items in transit as cash reserves and can use reserve balances to compensate their city correspondents for services (Banks' Appendix 183b-184b).

transactions to support more specialized services and personnel. The combination will have no adverse competitive effect on the national market, since the merged institution will rank in about 40th place nationally. The complaint does not charge a lessening of competition in this market.

6. In the retail segments of their business, the two Banks have located their branches to serve different portions of the Philadelphia four-county area, and the Comptroller found that the overall competition between their branches is not significant (Banks' Appendix 105b-110b).

7. Not only is Central-Penn far smaller than its reserve city rivals, it is also less well equipped for competition with them and with the larger banks in New York, Pittsburgh and other nearby financial centers, to retain its present wholesale business and attract additional wholesale customers. Its trust assets are one-twentieth the size of either of the two largest; its correspondent bank balances are less than one-tenth those of the leading bank; its foreign department consists of a single officer and a small staff; its operations are not as fully computerized as those of its larger competitors; its capital and earnings ratios are the lowest of the reserve city banks; and its stock sells at the lowest prices in relation to book value and earnings (Banks' Appendix 151b-152b, 229b-234b).

8. Merger with Provident will strengthen Central-Penn and improve its services in trusts, construction loans, correspondent banking, and foreign banking. The consolidation of their operations will very substantially reduce Central-Penn's operating costs.[8] Provident has the highest capital ratios in Philadelphia, offsetting Central-Penn's lower ratios. The branch systems of the two banks are complementary rather than competitive. In short, the

8. The savings to be expected from the merger were initially estimated at $1,250,000 annually (Banks' Appendix 152b). The figure was later increased to $1,500,000 annually (*Id.* 229b).

merger will provide a unique solution to Central-Penn's competitive problems and at the same time will provide an improved quality of services to retail and wholesale customers alike (Banks' Appendix 28b-34b, 105b-112b, 150b-155b, 230b-234b).

9. The Philadelphia metropolitan area is lagging in economic growth. From 1953 through 1964 its employment growth rate was one-twentieth of the national rate. The Port of Philadelphia is not holding its own in general cargo traffic as against competing ports on the Eastern Seaboard. There has been a serious decline in the number of substantial businesses maintaining their head offices in the City. In the vernacular, Philadelphia has been handicapped by a "small town," "branch office" reputation. Government officials and civic leaders are now engaged in efforts on many fronts to revitalize the area's economy [9] (Banks' Appendix 48b-52b, 155b, 156b, 240b-249b).

10. Philadelphia's banks are very much smaller than banks in nearby financial centers competing with the Philadelphia business and financial community. Each of the two largest banks in New York has total assets more than twice the combined total assets of the six reserve city banks in Philadelphia. The leading bank in Pittsburgh is twice as large as the leader in Philadelphia. Boston, Cleveland and Detroit all have larger banks than Philadelphia.[10] Part

9. See the following articles in the Business Review of the Federal Reserve Bank of Philadelphia: "Philadelphia's Missing Jobs," September 1964, p. 12; "Philadelphia and its Competitors," November 1965, p. 3.

10. The article "Philadelphia's Lagging Loans" in the Business Review of the Federal Reserve Bank of Philadelphia for February 1966 says (p. 11): "There are many other factors as well which may have had something to do with the lag in loans. Included among these are Philadelphia's proximity to New York (hence the physical ease of traveling to the nation's financial capital to negotiate a business loan), the smaller size of Philadelphia's banks relative to their New York cousins (which means that New York banks can loan more in one chunk to the firm with larger credit needs), and the fact that Philadelphia in recent years has lost some head offices of major firms through the merger route and otherwise."

of Philadelphia's economic problem is its "short pants" banks[11] (Banks' Appendix 52b-54b, 155b-156b, 240b-249b).

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11. So described by the then Mayor of Philadelphia testifying in the *Philadelphia National Bank* case. As Congressman Patman said in the course of the hearings on the 1966 Act, in determining the convenience and needs of a community, the logical first person to consult is the Mayor (Hearings on S. 1698 before the Subcommittee on Domestic Finance of the Committee on Banking and Currency, House of Representatives, 89th Cong., 1st Sess., pp. 161-3 (1965)).

OUTLINE OF ARGUMENT.

There is no dispute between the parties that the Constitution precludes the federal courts from performing legislative-type functions of the kind ordinarily entrusted to administrative agencies. If the Bank Merger Act contemplates a broad administrative inquiry to evaluate the public interest in a bank merger, the construction of the Act proposed by the Department of Justice is unconstitutional.

In point of fact, the decisions of banking agencies in respect of bank mergers, unlike those of the federal courts in antitrust cases, are administrative in nature. Through their decisions on merger, charter and branch applications, the agencies control the evolution of banking structure—permitting the creation of new banking units and the evolution of larger units as appropriate to meet the changing public needs. In making these decisions they take into account the benefits to be expected from the merger in the form of improved services or increased competition. They also take into account any detriments which might result from disapproval of the merger application.

The banking agencies' determinations are made against a background of experience and specialized information not available to a federal court. These include not only developments in the deposit and loan structures of commercial banks, but also the competition among banks and between banks and other financial institutions and the effects of the regulation of interest rates and banking credit.

There is no foundation for the Department's argument that the Bank Merger Act contemplates a narrower range of agency inquiry than is provided in other administrative statutes. When Congress was considering the Bank Merger Act of 1966, it knew that the banking industry, the bank regulatory agencies, and the Senators and Congressmen proposing the legislation were interpreting the phrase

"convenience and needs" in its broadest sense. There can be no doubt that the legislation incorporated that broad meaning.

Moreover, even under the narrow interpretation of convenience and needs proposed by the Department, the inquiry into these factors would still be so broad as to be legislative or administrative and not judicial.

The court below was correct in rejecting the Department's interpretation of "review de novo," because that interpretation would be inconsistent with the usual deference to administrative agencies and would also be unconstitutional. The court's interpretation of "review de novo" is consistent with the Constitution and follows the precedent of *Smithfield.*

Regarding the effect to be given to the agency approval, Congress, in the Bank Merger Act of 1966, changed the three legislative features of the Bank Merger Act of 1960 to which this Court pointed when it declined to defer to the agency approval in *Philadelphia National.* The 1966 statute, unlike the 1960 statute, (a) specifies the weight which the agency must give to competitive factors, (b) provides for a hearing before the District Court, and (c) makes specific provision for judicial review. The clear implication from these changes is that the banking agencies' decisions will no longer be disregarded but instead will be accorded the presumptive validity accorded to decisions of other regulatory bodies.

The decision of the court below that the Department has the burden of proof follows the normal procedure in review proceedings. Its decision that the Department has the burden of coming forward with the evidence on all factual issues follows *Smithfield* and is in accord with the statutory scheme of "review de novo."

The Comptroller's failure to hold a hearing does not detract from the weight to be given to his decision. Banking agencies traditionally operate without formal hearings in most cases, and this procedure has been endorsed by the

courts, the text writers, and the Attorney General. The agencies hold hearings in cases where they feel this procedure is appropriate, and the District Court can remand to the agency for a hearing in any case.

The disagreement between the Department and the banking agencies should be resolved—not by making two separate and independent determinations, one by the agency and the other by the court—but by subjecting the agency determination to judicial review. That is the holding of the court below.

The Department of Justice staked its case on its interpretation of the Act and made no effort toward an interlocutory appeal, although it well knew that by so doing it was risking a final judgment on the merits. The dismissal with prejudice entered by the court below was in accordance with Rule 41(b) and the decisions thereunder and should be affirmed without remand.

ARGUMENT.

I. The Judgment Below Should Be Affirmed.

There is no dispute between the parties that, to use the words of the Brief for the United States (p. 46), "Article III of the Constitution precludes the federal courts from performing legislative-type functions frequently entrusted to administrative agencies."[12] There would also appear to be no dispute that if the words "public interest" and "convenience and needs" are used in the Bank Merger Act with the broad meaning they have acquired in connection with other regulated industries,[13] the determination of public interest in a bank merger is a legislative function, not a judicial one, and the judgment of the court below should be affirmed.

The Brief for the United States (p. 42) admits that "superficially" the wording of the Bank Merger Act invites "an unchanneled inquiry into all phases of the merger's possible impact." It then argues, however, that "a much more narrow and focused inquiry was intended." Later sections of this brief will show that Congress did not intend the "narrow and focused inquiry" envisioned by the Department, and furthermore that, even under the

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12. The classic citations are: *Federal Radio Commission v. General Electric Co.*, 281 U. S. 464 (1930); *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266 (1933). See also, *Federal Power Commission v. Idaho Power Co.*, 344 U. S. 17 (1952); *Postum Cereal Co. v. California Fig Nut Co.*, 272 U. S. 693 (1927); *Keller v. Potomac Electric Power Co.*, 261 U. S. 428 (1923).

13. In holding that "public interest" was a proper basis for delegation of the legislative function under the Transportation Act of 1920, this Court said "the term 'public interest' as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred." *New York Central Securities Co. v. U. S.*, 287 U. S. 12, 25 (1932).

Department's narrow interpretation, the function would still be legislative or administrative and not judicial. But before proceeding with that analysis, we will here review the policy considerations and administrative expertise involved in determining whether a bank merger is in the public interest, and will show that the court below was right in holding that this is the kind of determination which a federal court is not equipped to make and is not permitted to make under the Constitution.

The Determination of Public Interest in a Bank Merger Involves Administrative Policy.

Unlike the decision of a federal court in a Clayton Act case, the decision of the Comptroller or the Federal Reserve Board or the Federal Deposit Insurance Corporation (or the state banking authorities) in respect to the approval or disapproval of a bank merger is not an isolated action. While the court concerns itself only with the challenged merger, the decisions of the banking agencies on individual mergers are part of the administrative process by which the agencies control the evolution of the banking structure to meet the changing public need for credit and for banking, fiduciary and financial services. The Comptroller of the Currency has stated:

> "The banking structure that is most ideal in terms of the public need will vary with the changing requirements for banking services and facilities. Like the operating powers of commercial banks, the structure of the banking industry must continuously be adapted to emerging demands and opportunities." (1964 Annual Report of the Administrator of the National Banks, reprinted as a Supplement to this Brief, p. S-1)

The control of banking structure involves the administrative control of bank charters and branches as well as

mergers.[14] The policies followed by the Comptroller in passing upon charter, branch and merger applications were described in his 1964 Annual Report issued September 1, 1965. Portions of that report were considered by the House Committee on Banking and Currency during its debate on the Bank Merger Act of 1966 and are reprinted in the Hearings of the Committee (Statement of James J. Saxon, Comptroller of the Currency, Hearings on S. 1698 before the Subcommittee on Domestic Finance of the Committee on Banking and Currency, House of Representatives, 89th Cong., 1st Sess. pp. 730-733 (1965)). The pertinent sections are printed in full as a supplement to this brief.

The Comptroller recognizes that the public interest is not well served by a superabundance of small banking units any more than it would be served by great numbers of small railroads. A limited number of larger units are needed to meet the needs of large corporations and financial institutions and to exploit the large-scale capacity of modern automation techniques and computers for providing efficient operations and services [15]—which are available to customers of all sizes and to country correspondent banks and their customers. Because of the statutory and regu-

14. The cumulative effect of administrative decisions approving or denying merger and branch applications on the evolution of banking structure in New York is described in Note, "Branching and Merging under New York's Omnibus Banking Law," 115 U. of Pa. L. Rev. 218, 222-230 (December 1966).

15. Governor Mitchell of the Federal Reserve System, speaking to the American Economic Association in May of 1966 on "The Impact of Automation on Bank Structure and Function," said: "If this [full use of automation and computers] should happen—and assuming public policies are accommodative—not only banking services but also banking structure could be literally transformed. Profound structural changes seem almost a certainty. Automation can and will burst the locational constraints that are implicit in Federal conformity to the provisions of 50 State banking laws pertaining to branching. Not only will metropolitan area-wide banking operations become commonplace everywhere at the option of bank managements but remote control banking State-wide, and even across State lines, will also be feasible, limited by little more than the telephone toll costs of servicing more distant customers."

latory limitations on the banking business, older and slower-growing cities cannot expect to obtain larger banking units through internal growth. In such circumstances, mergers should be permitted in a limited number of cases where they are clearly in the public interest. On this point the Comptroller's Statement of Policy says:

> "The public benefits which may be derived from mergers stem basically from the economies of large-scale enterprise, and the greater variety of services which larger firms may offer to consumers. These benefits will arise where increases in the scale of operations yield savings in costs, or where a broadening in the lines of production or the extension of operations to new markets permit greater dispersion of risks and thus allow the undertaking of ventures unsuitable for smaller firms. A larger and more broadly based bank may also be able to offer specialized services which are not profitable for smaller institutions, and should be able to move capital more efficiently from surplus to deficit areas. Moreover, the legal lending limits of banks require the presence of larger institutions to meet the needs of larger businesses most proficiently."
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> * * *
>
> "There are two reasons why merger may often be the preferred course of expansion in banking, even though in comparable circumstances reliance on internal growth may be more appropriate for the unregulated industries.
>
> "First, the banking authorities have a positive responsibility to see that the public convenience and need for banking services and facilities are met. In carrying out this responsibility, they do not have the authority to require the provision of service such as is found in the fully regulated industries like the 'public utilities'; their choices are limited to the private proposals for bank expansion presented for their approval.

If they find that a proposed merger will yield public benefits and they see no superior means for achieving these benefits either at hand or in clear prospect, they have a strong positive reason for approving the merger. In the unregulated industries, there is no public responsibility to fashion industry expansion according to the public need; reliance is placed on private initiative and no public authority faces the problem of choosing the form or method of industry growth." (Pages S-10, S-11, S-12, *infra*)

Chairman Martin of the Federal Reserve System, testifying before the House Committee, said:

> ". . . It is very difficult to make these quantitative and qualitative judgments on these things, with the country on the march as it is today. We are a growing, developing, advancing country. There are going to be shifts from small banks to medium-sized banks and medium-sized banks to large banks; and with the fact that there are certain institutions like the Bank of America, which is an outstanding bank in your own State, they should not be just isolated all alone forever. They are entitled to respect for the achievements that they have made, but they are not entitled to protection any more than a medium-sized bank or a small bank would be." (Hearings on S. 1698 before the Subcommittee on Domestic Finance of the Committee on Banking and Currency, House of Representatives, 89th Cong., 1st Sess., p. 141 (1965).)

The circumstances of the instant case are illustrative of these policy considerations. Philadelphia needs larger banking units for its economic health, but the Philadelphia economy is not expanding sufficiently to permit a major expansion of any Philadelphia bank by internal growth. Moreover, the banking law of Pennsylvania limits the Philadelphia city banks to an artificial four-county area (Banks' Appendix 184b-191b). This denies them the right

to branch into such nearby communities as Downingtown, Coatesville, Allentown, Bethlehem, Reading, York and Lancaster, which would otherwise be natural areas for expansion and growth. Furthermore, the Pennsylvania-New Jersey boundary prevents Philadelphia banks from entering Camden, and the boundary with Delaware makes Wilmington "off-limits." Thus, the Philadelphia banks are hedged into an unnaturally confined area with little growth possibility.

In these circumstances the practical alternatives facing the banking agencies are either to disapprove all but the most inconsequential mergers, thus freezing the present status and immunizing the existing leaders from challenge, or, as the Comptroller has done in this case, to approve a merger which will improve the competitive climate [16] and provide better service.

The Federal Reserve Board agreed with the Comptroller that the merger of Provident and Central-Penn will have just such pro-competitive effects. Its advisory report says:

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16. The effect of the merger in tightening competition among the larger banks can be seen in the following tabulation showing the leading banks' shares of deposits of individuals, partnerships and corporations at October 13, 1965, as computed by the Federal Reserve Board (Banks' Appendix 83b-84b) and the same figures recomputed to reflect the merger of Provident and Central-Penn:

Before Merger		*After Merger*	
First Pennsylvania	20.2%	First Pennsylvania	20.2%
PNB	17.6	PNB	17.6
Girard	16.2	Girard	16.2
Fidelity	12.8	Provident	15.1
Provident	9.7	Fidelity	12.8
Continental	5.8	Continental	5.8
Central-Penn	5.4	IVB	2.8

No other financial center in the country (with the possible exception of New York) presents such an evenly balanced array.

Moreover, the Federal Reserve Board reported that "the Philadelphia four-county area is not unduly concentrated as compared with the nation's major standard metropolitan statistical areas" (Banks' Appendix 86b).

"Currently, Provident is the fifth largest bank in the Philadelphia four-county area in terms of IPC deposits and loans, and it ranks sixth in terms of banking offices. Central-Penn ranks seventh in these three categories. If the proposed merger is consummated, the resulting bank would rank fourth in size based on IPC deposits, third in size based on loans, and first in size based on the number of banking offices. In addition to having the most offices, the geographical coverage of such offices in the four-county area would be the most thorough and extensive of the area banks. With regard to the trust department, Provident currently ranks fourth behind First Pennsylvania, Girard, and Fidelity in the value of assets held and, if the merger is consummated, it would still rank fourth in the value of assets held although it would be first in the number of individual accounts under administration. Concerning the Philadelphia area, the resulting bank, with its increased lending limit and its branch system enlarged, *would be in a position to compete more effectively* with the three largest Philadelphia banks; namely, The First Pennsylvania Banking and Trust Company, The Philadelphia National Bank, and Girard Trust Bank." (Emphasis supplied.) (Banks' Appendix 76b, 85b)

Other policy aspects are involved when the regulatory agency considers what may happen to the banking structure if the merger application is denied. In the instant case it is clear that if the merger is forbidden the larger banks in Philadelphia will be relieved of the competition which the merged bank would have provided. But that is not the end of the matter. If Central-Penn is denied the right to merge, some banking services which it now provides to the public may be lost. Central-Penn has the lowest earnings ratios among the Philadelphia reserve city banks. The competitive pressure to improve earnings could well lead to the elimination of operations considered to be high in

cost or low in profit, regardless of the community need for such services (Banks' Appendix 157b, 232b-233b).

Another possibility which might suggest itself to future management, if the merger were denied, would be to move the Bank's head office outside Philadelphia County, thus lowering the Bank's required reserves on demand deposits by 27% and obtaining branching privileges in three counties additional to the four in which the Bank can now branch (Banks' Appendix 188b). A further possibility would be to convert the institution to a state bank and resign from the Federal Reserve System, thus obtaining the right to obtain income from 40% of the Bank's reserves which now yield no return to the Bank[17] (*Id.* 184b).

While such a move might improve the Bank's earnings ratios, it would be undesirable on two counts. First, it would contribute to a trend which has given increasing concern to the Federal Reserve Board.[18] Second, it would

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17. This possibility is discussed in more detail in the affidavit supporting the memorandum of the Banks opposing any further stay of the merger (Banks' Appendix 298b). See also, "The Changing Profitability Gap," Business Review of the Federal Reserve Bank of Philadelphia for July 1966, which analyzes the earnings performance of country banks versus reserve city banks in the Philadelphia area and concludes that, during 1961-65, "Earnings of country banks in the district rose much faster than those of reserve city banks" (p. 13).

18. The Federal Reserve Board has noted this problem with concern. Its Annual Report for 1965 states: "The increase in demand for credit and the corresponding increase in competitive pressures to avoid the burdens of reserve requirements in attempting to meet this demand have resulted in accelerated withdrawals by member banks from the System in recent years. While the problem heretofore has been primarily one of inequity between member and nonmember banks, it is fast reaching the point where System effectiveness in the implementation of monetary and credit policy may be impaired. During the decade 1946-55, an average of 9 banks per year terminated their membership in the System, whereas in the decade 1956-65, average withdrawals jumped to 24 per year. It is even more significant, in this connection, that such withdrawals during the last decade included a number of relatively large banks, with the result that deposits substantially in excess of $2 billion ceased to be subject to reserve requirements imposed in accordance with the Federal Reserve Act" (page 236).

adversely affect competition in wholesale banking among Philadelphia banks. The reason is that a change in status from reserve city bank to nonmember country bank would substantially curtail Central-Penn's wholesale business; and the wholesale business lost by Central-Penn would gravitate—not to the next smallest bank as it would under the proposed merger with Provident—but to the largest wholesale banks in the City. Thus, in reaching a decision to approve or disapprove a merger, the agency cannot assume that disapproval will perpetuate the status quo. The result of disapproval may be to force other structural changes which would be substantially adverse to the public interest.

A decision which involves the weighing of policy considerations such as these is appropriate for an administrative body which can take into account not only the capacities and intentions of the banks involved, but also the capacities and probable intentions of other banks, and which can also control other mergers and expansions by other means. The decision would be inappropriate for a federal court. In the words of the District Court for the Southern District of New York, speaking of the Manufacturers-Hanover merger:

> "We think that if ever there were a field requiring administrative expertise to unravel the tangled threads of the evidence and weave them into a meaningful fabric, this is it. This case involves a multitude of technical, intricate and complex problems in the field of money and banking, a subject within the special competence of the [Federal Reserve] Board and outside the conventional experience of judges.
>
> "The Board is intimately familiar with this technical subject matter, as well as the competitive realities involved, from its long experience as the administrator of the nation's banking system, periodic reports, examinations, studies, etc. It knows the relevant products; the parties to this merger and the pattern

of their business; the extent, locus and significance of previous competition between them; the number, strength and pattern of business of remaining competitors and the vigor of competition, both locally and nationally; the banking habits of all customers, great and small; their practicable banking alternatives; the geographic areas of effective competition for their banking business; the history, interrelationships and trends of the geographic markets; the probable impact of the merger on depositors, borrowers and competitors, great and small, local and national; the degree of concentration, locally and nationally; the reasons for concentration and its effect on the competitive picture; the operations of the nation's money markets; and the effect of the government's monetary and fiscal operations on the markets and the impact of this merger upon them." *U. S. v. Manufacturers Hanover Trust Co., supra* at 881.

In the final analysis, public interest means what is good for the community. Do the business and financial institutions in the community need banks with larger lending limits? Would new businesses be attracted if the banks in the community offered more sophisticated services? Will the merged institution have the prestige to attract specialized personnel to provide these services? Will it be efficient enough to afford them? Will improvement in its services stimulate its competitors to improve their services? These are the questions that must be answered and they are preeminently legislative in nature.

The Determination Required by the Bank Merger Act Involves Administrative Expertise.

In addition to policy, the determination of public interest in bank mergers involves many considerations which can be described, in the words of the court below, as "expertise" or "know-how." These are matters of day-to-

day experience to an administrator and form an unwritten background for his policy decisions. For the court to obtain the same background, the trial would have to include a seminar in banking history and practice. For example:

(a) Since this Court's decision in *Philadelphia National,* there has been a major change in the deposit structure of commercial banks. With rising interest rates, depositors (especially large corporations) have reduced their non-interest bearing demand deposits. This has forced the banks to rely increasingly on interest-bearing time deposits. The cost of paying interest on these deposits has narrowed profit margins and made more urgent the need for operating economies. Such economies, in turn, are largely dependent on the use of computers, which are costly to acquire and operate. All of these developments have a bearing on the Provident–Central-Penn merger (Banks' Appendix 230b-234b).[19]

(b) Related to the changes in deposit structure are changes in the competition between commercial banks and other financial institutions and among the larger commercial banks. The competition for corporate funds has led the larger banks to issue negotiable certificates of deposit, a new and highly controversial instrument in the money market. Again, these developments have a significant bearing on the instant merger in relation to the wholesale segment of the Banks' businesses[20] (Banks' Appendix 233b).

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19. This change has been commented upon extensively in banking periodicals; see, e.g., "Changing Patterns of Bank Deposit Growth," Monthly Economic Letter of First National City Bank of New York for June 1966, page 64; "The Race for Savings," Business Review of Federal Reserve Bank of Philadelphia for December 1965, page 14.

20. The Monthly Review of the Federal Reserve Bank of New York for November 1965 described this competition thus: "The negotiable time certificate has greatly contributed to a broadening of the competition for bank deposits from the local and regional to the

(c) A third development which has occurred almost entirely since *Philadelphia National* is the complex matter of automation and its effects on commercial banks. In addition to computerizing their own operations and providing electronic data processing for their customers, reserve city banks provide similar services to their correspondent country banks. Any improvement in the services of the city bank improves the quality of banking services offered by the country bank and thus affects competition between that country bank and its competitors (supported by their city correspondents).[21] Thus, developments in this field will have effects throughout the area where the Banks have correspondents—i.e., Pennsylvania, New Jersey, Delaware, Maryland, the District of Columbia and Virginia. The District Court would be hard pressed to weigh the significance of these developments independently of the Comptroller.

(d) Another important development in recent years is the change in the loan portfolios of commercial banks (at least those in the reserve city category) from the traditional short-term self-liquidating loans to the much more complex term loans to finance new processes, products and equipment. These complicated

nationwide level. Furthermore, the competition for profitable loans and investments has also been broadened, since the C/D market facilitates the search for the needed resources once the lending opportunity arises. The large money market banks have turned out to be strong competitors, particularly because a C/D possesses greater marketability if it is issued by a bank of national repute. This criterion is readily met by the large New York banks, which are therefore able to obtain deposits by issuing C/D's at somewhat lower interest rates than smaller and less well-known banks. The competitive strength of New York 'prime banks' is reflected in the absolute and relative growth of their outstanding C/D's" (p. 249).

21. For example, see "Country Banks and the Federal Funds Market," Business Review of Federal Reserve Bank of Philadelphia for April 1966, which describes how "the big city correspondents are very much involved in assisting the country member banks in the Third District with federal funds and related transactions" (p. 7).

loans require specialized personnel, which a bank cannot afford without a substantial volume of such transactions. This development has affected the business of Central-Penn and is a significant factor in the background of the merger.[22]

(e) Other considerations were present in the San Francisco bank merger case,[23] including the effect of the merger on foreign and international banking and on competition in bidding for state and municipal bonds.

(f) Even the evaluation of the services offered by the merging banks and promised by the resulting institution—an evaluation which must be made in every case—demands a background of banking expertise. In the words of the Comptroller, testifying before the House Committee:

"... It seems to us we must deal with these terms not in a broad brush sweep but in terms of the particularities and specifics of the banking business, how is the public interest, public effect, to be determined? To me this means breaking down the effect by category of services of banks in terms of the user public.

22. Among many commentaries, see "Sharp Increase in Number of Term Loans Lengthens Maturity of Whole Portfolio," Review of Federal Reserve Bank of New York for January 1967.

23. *U. S. v. Crocker-Anglo National Bank, et al., supra.* The California court cited with approval the following quotation from Finfrock, "Trial *de Novo*—Panacea?" in 14 Baylor Law Review, 135, 160: "This criterion [public policy] in essence classifies as administrative and non-judicial, decisional functions which courts are not particularly equipped to decide while leaving to the court that category of decision making with which it has traditionally dealt and is equipped to handle under the adversary type of judicial procedure. Decisions that require the inquisitorial type of procedure, investigative in nature, and which must, to attain optimum utility, be based upon a mosaic of expert opinion, judgment, and decisions are and should be regarded as non-judicial and left primarily to the administrators. They are far more able to come to grips with such problems than a court or jury in the detached and sterile atmosphere of the courtroom." Trade Reg. Rep. (1966 Trade Cas.) ¶71,898, p. 83,154 fn. 5.

"How is the consumer of bank services affected?

"Has loan volume been reduced? Is a certain type or are certain types of loans unavailable, consumers loans, or less available? Have rates been increased or decreased? Are there broader services or fewer services rendered? Are the services of lesser or better quality?

"Are the costs higher or lower? These are the true measures in terms as I would define the public interest and the effect of competition and the effect generally of the merger on the consumer public, not in terms of a broad sweep that this is somehow contrary to the public interest. It seems it can be meaningful only in terms of breaking down that, in terms of the actual services rendered by the institution.

"Broader or lesser, qualitywise, costwise, ratewise, and otherwise, and the effect in individual cases on various parts of the consuming public. Otherwise it seems to me this term 'public interest' has meaningless implications, meaningless application.

"And this is what we attempt to do in every situation.

"What are your service charges? What are your rates? What kind of loans do you grant? Do they grant consumer loans? Do they take savings? What rate do they pay on savings? Do they have trust service? What are the trust service rates? What do the schedules show? And the vast area of service. To what extent are they really serving the public in terms of specifics and will this be improved or not as a result of the merger and so, as in many cases, actually to enhance competition, as frequently happens." (Hearings on S. 1698 before the Subcommittee on Domestic Finance of the Committee on Banking and Currency, House of Representatives, 89th Cong., 1st Sess. pp. 717-718 (1965))

> Does the Department of Justice seriously propose that the court shall answer those questions and evaluate the result independently of the Comptroller and free of presumptions traceable to his informed judgment?

All the foregoing must be understood against still another background—the complex regulatory process by which the Federal Reserve Board controls the amount of credit available to banks, the ability of commercial banks to bid for interest-bearing deposits in competition with savings institutions and other investment media, and even the kinds of loans which banks can make in times of credit scarcity. Again, this regulatory scheme and its effects on bank growth and competition are commonplace to the banking agencies—but not to a federal court.

There Is No Foundation for the Department's Narrow Reading of the Act.

Admitting that determinations of public interest and community convenience and need are generally wide-ranging and legislative in nature, the Department of Justice argues that in the Bank Merger Act "a much more narrow and focused inquiry was intended." A review of the legislative history shows the opposite—that Congress intended the phrases "public interest" and "convenience and need" to have the same broad meaning in the Bank Merger Acts of 1960 and 1966 that they have had throughout the history of regulated industries.

Congress knew that public convenience and necessity is the basis for regulatory decisions of the Interstate Commerce Commission (49 U. S. C. §§ 306, 307, 909), the Civil Aeronautics Board (49 U. S. C. § 1371), and the Federal Communications Commission (47 U. S. C. §§ 214, 307). In the field of banking, the standard of community convenience and need is to be found in state statutes regulating the chartering, branching and merging of banks; e.g., New York Banking Law §§ 24, 29; Pennsylvania Banking Code §§ 1007, 1604 (7 P. S. §§ 1007, 1604).

These provisions have been broadly interpreted. For example:

> "[P]ublic convenience and necessity may be found in operating economies and those things which contribute to expedition, public safety, and, efficiency in operation, because, while they benefit the carrier first, they indirectly contribute to the public safety and more reliable and expeditious and cheaper transportation." *East Texas Motor Freight Lines v. U. S.*, 96 F. Supp. 424, 428 (N. D. Tex. 1951).[24]

When Congress was considering the 1966 Bank Merger Act, it had very much in mind *Philadelphia National Bank* and the considerations of public interest which the banks advanced in that case and which this Court held to be irrelevant. Those considerations were, primarily, increased competition in the national market and the stimulation of economic development (374 U. S. at 370, 371). It follows that these were the kind of factors which Congress expected would be taken into consideration under the Bank Merger Act of 1966.[25]

Moreover, Congress also had before it the statements of the regulatory agencies as to what they routinely take into account under the heading "convenience and needs."

(a) *The Comptroller of the Currency.* The Comptroller's views are set out in the Supplement to this

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24. See also, *Aero Mayflower Transit Co. v. U. S.*, 95 F. Supp. 258, 262 (D. Neb. 1951).

25. The House Committee report states that the expression of certain factors in the statute "would not preclude the banking agencies, charged as they are with general supervisory responsibility, from considering in any particular case such other factors as they might deem relevant" (H. Rep. No. 1221, 89th Cong., 2d Sess., p. 4). Perhaps the best indication that Congress expected the banking agencies and the courts to consider the factors advanced by the banks in *Philadelphia National* is Section 3 of the Bank Merger Act of 1966 (Banks' Appendix 7b), which permits the Philadelphia National and Girard banks to reinstitute their merger application and have it decided under the new Act.

brief. He mentioned particularly economies of operation, improved and specialized services, and larger lending limits. (Infra, page S-10)

(b) *The Federal Reserve Board.* The views of the Federal Reserve Board were expressed by George W. Mitchell, a Member of the Board, as follows:

> "How does one go about judging whether the convenience and needs of the community will be benefited by a change in banking ownership and management? This involves determining the actual breadth and intensity of community demands for various banking services, as distinct from the quantity and quality of services that the existing and proposed new combinations of banks intend supplying. To do this one needs to survey community opinion on the status quo, to find out how both business and household customers appraised the quantity and quality of the banking services available to them.
>
> "But it is hard for bank customers to compare services they are accustomed to with those they have never had the opportunity to try out. Such survey results, therefore, must be supplemented by a more knowledgeable appraisal. In this appraisal, the broad experience of bank examiners in the qualitative and quantitative aspects of banking services can usually be helpful.
>
> "Another aspect of the impact of bank mergers upon the 'convenience and needs of the community' concerns the contribution that banks can make to economic growth and stability in their own communities. A bank that is investing heavily in out-of-State business loans, tax-exempt securities, or mortgages contributes less to its 'com-

munity than one that is playing an active role in satisfying the credit needs of local businessmen, farmers, consumers, and governments. Clearly, so far as the community's convenience and needs are concerned, a merger involving the first bank would be far less objectionable from the public point of view than would a merger involving the second. Accordingly, a careful inventory of the extent of local and nonlocal credits in the bank's loan and investment portfolio is called for in order to clarify its role in community financing.

"In these ways—through surveys of community views, informed professional judgments, and a review of the record of the bank's participation in financing its community—reasonable bases for judgment can be established as to what the 'convenience and needs' of the community are and how well the existing institutions have met them. Against this must be weighed the record and assurances of the merging bank as to what it can and will supply. The final balancing of these considerations remains a matter of judgment but, with evidence before them of the type I have outlined, supervisory authorities can judge with a fair degree of assurance how well a proposed merger meets the 'convenience and needs' test." (Statement of George W. Mitchell, Member of the Board of Governors, Federal Reserve System, at the Hearings on S. 1698 before the Subcommittee on Domestic Finance of the Committee on Banking and Currency, House of Representatives, 89th Cong., 1st Sess. p. 377 (1965)).

(c) *Federal Deposit Insurance Corporation.* The views of the Federal Deposit Insurance Corporation were expressed by its Chairman, K. A. Randall, as follows:

"Generally, in processing applications, it develops that the factor—effect of the proposed transaction upon competition—is most important. This factor, as you are aware, is also usually the most difficult to resolve. Closely allied with a determination on this factor is the factor 'convenience and needs of the community.' In many cases there is considerable overlapping of the two factors, and, in most of our merger proposals, these two factors weigh most heavily in our analysis, along with management and the condition of the bank. It has been the Corporation's policy that the weighing of the statutory factors must indicate a 'positive' rather than merely 'neutral' benefit to be obtained by the public as a result of the merger before it is approved. Positive benefits would be broader services being made available, correction of unsatisfactory condition or unsatisfactory management aspects of participating banks, or increased competition, or additional benefits to the community, or a combination of some or all of these benefits." (Written reply of K. A. Randall, Chairman, F. D. I. C. to written questions of Representative Patman, Hearings on S. 1698 before the Subcommittee on Domestic Finance of the Committee on Banking and Currency, House of Representatives, 89th Cong., 1st Sess. p. 897 (1965))

In the course of congressional debate, Senators and Representatives gave their views as to the broad scope of inquiry intended by the phrases "public interest" and "convenience and needs":

Senator Robertson:

"Clearly, the effect of the merger in meeting the convenience and needs of the community to be served is not limited to the immediate area within which the

bank may establish branches. In any metropolitan area the competition between suburban banks and downtown banks for the accounts of commuters is intense. Clearly, the great international banks with branches all around the world are not competing in the United States only within the limited area in the United States within which they may open their American branches. A New York City bank, which can only have branches in a limited area of New York State, is clearly competing through its branches in Paris and Rio de Janeiro and Bombay and Australia. It is also competing in Newark and Albany, in Boston and Richmond, in Chicago and Dallas, and in San Francisco and Los Angeles.

"The community to be served by the giant international loans of this kind of a bank is very different from the community to be served by the two small banks I mentioned earlier, and it is very different also from the community which the big New York bank serves through its automobile loans and special checking accounts at its branches in New York City. The effect of the merger on the public interest and on the convenience and needs of the community to be served must be measured in specific and realistic terms in the light of the kinds of business involved and the kinds of people being served. The banking agencies and the courts must be guided by the realities of the industrial, commercial, and financial worlds. They must look through theories and percentages and doctrines to the hard facts of life." 112 Cong. Rec. (daily ed.) 2542

Congressman Moorhead:

"First, let us consider the fact that banking is a regulated industry. In the banking industry the public interest is represented and protected by a regulating body. In mergers in such a situation the custom is

that the validity of a merger should be determined not exclusively by the competitive factors, but that the regulating body should also consider the public interest.

"The Supreme Court of the United States gave such an interpretation to the Interstate Commerce Act in *McLean Trucking Company v. U. S.*, 321 U. S. 67, 87 (1945) where the Court said:

> In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the overall transportation policy.

"On November 22d of last year, the Supreme Court cited and quoted McLean Trucking Co. in a per curiam decision, *Seaboard Air Line R. Co. v. U. S.*, 34 LW 3181. In this case, an ICC order approving a merger was set aside by a three judge district court on the ground that the Commission had not determined whether the merger violated section 7 of the Clayton Act. The Supreme Court reversed the lower court saying:

> By thus disposing of the case, the district court did not reach the ultimate question whether the merger would be consistent with the public interest despite the foreseeable injury to competition.

"In H. R. 12173 we are merely saying that first the banking authorities, and then the Attorney General, and finally the courts may approve a bank merger 'despite the foreseeable injury to competition,' if 'the merger would be consistent with the public interest.'" 112 Cong. Rec. (daily ed.) 2340.

Congressman Ottinger:

> "The standard is clear and as adequately precise as is possible in an area of judgment where many factors play and there is a wide variety of situations to which the standard is to be applied. . . . It is very analogous to the public convenience and necessity standard included in Federal and virtually every State public utility regulatory statutes." 112 Cong. Rec. (daily ed.) 2349.

The Attorney General made an unsuccessful effort to restrict the scope of "convenience and needs" in a letter to Congressman Reuss dated January 5, 1966.[26] In that letter, the Attorney General commented adversely on provisions substantially identical to those appearing in the final Act and suggested a draft which would have explicitly limited "public interest" to "protecting the public against bank insolvency."

In the face of the Attorney General's draft, and with full knowledge that the banking industry, the bank regulatory agencies, and members of Congress were interpreting "convenience and needs" in the broadest possible way, Congress continued the phrase unchanged. There can be no doubt that Congress intended, to use the words of the Brief for the United States, "a general public interest standard" permitting "inquiry into all phases of the merger's possible impact."

The Department's Narrow Reading of the Act Would Not Make the Evaluation of Convenience and Needs a Judicial Function.

If it be admitted, for the sake of argument, that the Department of Justice is right and that Congress did intend to limit "convenience and needs" to floundering banks (Brief for the United States, p. 42), regional and national

26. H. Rep. No. 1221, 89th Cong., 2d Sess., pp. 16-18.

competition (*id.* at 44), and new and important banking services (*ibid.*)—the function of weighing these factors is still administrative and not judicial:

(a) The Department admits that convenience and needs includes the problem of a bank which is "unable to render adequate service to the community" because it is "below the economic minimum size to attract capable and vigorous management personnel" or is held by "owners who insist on unrealistically conservative policies" (Brief for the United States, p. 43). Does the Department seriously contend that a District Court in a trial de novo—and this Court on appeal—should become embroiled in whether the conservative policies of a bank management are realistic or unrealistic; whether the management is capable and vigorous; if not, whether the bank is or is not of an economic size to attract personnel having these characteristics; and finally, whether the bank's services are adequate or inadequate, and by what standard?

(b) The Department admits that convenience and needs includes the promotion of competition in the regional or national market (Brief for the United States, p. 44). Courts are accustomed to deciding whether mergers may have *anti*competitive effects in any market. They have no experience in determining *pro*-competitive effects in other markets. And the weighing of pro-competitive effects in one market against the anticompetitive effects in another to determine the ultimate public interest is a legislative function.

(c) The Department admits that it is appropriate to consider the effect of a merger in "bringing to the community a new and important banking service." The Department sees "nothing beyond the limits of judicial competence in a determination whether a

claimed improvement in banking service is in fact new and important" (Brief for the United States, p. 44). The fallacy of delegating such determinations to the courts is shown by one of the services which the Department chose to illustrate what, in its view, is not new or important—credit cards. Even to the untutored eye, it should be plain that credit cards may have vast significance for commercial banking. They can be used nationally and internationally. They can be meshed with checking accounts to provide unified financial services. They may well be the first step toward the "checkless society" and the elimination of the physical handling of 12-14 billion checks a year.[27] Their evolution clearly is a matter of administrative concern, and just as clearly is not a matter for decision by the District Courts.

Nothing could better illustrate the errors in the Department's reading of the Act than its statement (Brief for the United States, p. 46) that the impact of the merger upon employment in the community is clearly beyond the scope of convenience and needs. This factor was one of those singled out for mention in the Committee Report on Senate

27. "But the vistas painted by banking specialists, computer manufacturers, and the American Telephone & Telegraph Co. point to an America not many years hence in which the housewife uses the telephone to pay cash in stores, make credit transactions, and pay bills at home. Such a vision may require a dramatic change in banking—perhaps creation of a giant 'financial utility' that controls the terminals for all transactions and holds credit information on every citizen.

"This utility may replace all individual credit card systems with a single 'universal card' for everyone, valid anywhere, and make credit references available instantaneously. It also would control communications facilities among banks and the clearing of payments. Payrolls would flow automatically from corporate accounts to individual accounts, and each morning corporate treasurers would see a computer's print-out of all the money that has flowed into it from banks during the night." "Next in banking: pay bills by phone," Business Week for November 13, 1965.

Bill 1698 (one of the numerous versions of the legislation). That report said:

> "In considering the convenience and needs of the community to be served, the committee expects the banking agencies, the Attorney General, and the courts to take into consideration the benefits to the banks and to their customers of sound, vigorous competition. At the same time, the committee expects the banking agencies, the Attorney General, and the courts to recognize the importance of sound and strong banks which can provide the banking services essential to the full development of the economy, *to full employment* and full production." (Emphasis added.) H. Rep. No. 1179, 89th Cong., 1st Sess., p. 5.[28]

The District Court's Interpretation of "Review de Novo" Is Correct.

The Department of Justice makes much of the statutory direction that the District Court shall "review de novo the issues presented." It argues that, by this direction, Congress intended the court to make an independent determination of the legality of the merger, rather than to review the banking agency's determination.

The court below rejected the Department's construction of the phrase "review de novo", because the Department's construction is inconsistent with the deference usually accorded to the expert judgment of administrative bodies and is also inconsistent with the constitutional separation of powers. The court gave to the phrase "review de novo" in the Bank Merger Act the same meaning with which it had been used in the *Smithfield* case *(First National Bank of Smithfield, North Carolina v. Saxon, supra)*. In-

28. For an example of the impact that progressive banks can have on attracting and encouraging the development of industry, see "Seeding Science-Based Industry," Business Review of Federal Reserve Bank of Philadelphia, May 1966, p. 3.

deed, the *Smithfield* case may have been the source of the phrase as used in the Bank Merger Act.[29]

The preceding sections of this brief have shown that the court below was right when it held that the Department's interpretation of "review de novo" is inconsistent with the Constitution. That is sufficient to dispose of the Department's appeal. However, in the following pages we will show that the District Court's interpretation of "review de novo" is fully consistent with the congressional intent.

The best way to find what Congress intended is to see what Congress did. The starting point for a determination of congressional intent in the Bank Merger Act of 1966 is to examine what changes Congress made in the statutory scheme after *Philadelphia National.*

In *Philadelphia National,* the defendant banks contended that the Comptroller's approval immunized the merger from challenge under the antitrust laws. This Court rejected the contention, holding that an approved merger was subject to attack in a suit under the Clayton Act and that in such a suit considerations of public interest under the 1960 Bank Merger Act were irrelevant because the legislature, in the Clayton Act, had established a policy proscribing anticompetitive mergers, "the benign and the malignant alike" (374 U. S. at 371). The reasons given by this Court for disregarding the Comptroller's decision were

29. In September 1965, the House Committee was considering a bill which would have provided for an appeal to a Court of Appeals under the substantial evidence rule. The Attorney General objected to this and suggested that the bill be amended to provide for a *trial* de novo in a District Court (letter dated September 24, 1965, H. Rep. No. 1221, 89th Cong., 2d Sess., p. 9). The Committee accepted the Attorney General's suggestion that the proceedings in court should be de novo, i.e., that the parties should be free to introduce new evidence, but it rejected his suggestion for an entirely new trial and provided instead that the court's function should be one of "review." The Attorney General himself proposed the phrase "review de novo" in a draft bill which he forwarded to the Committee in January 1966 (H. Rep. No. 1221, 89th Cong., 2d Sess., pp. 16-18) —after the *Smithfield* decision was published.

that, although the Comptroller was required under the Bank Merger Act of 1960 to consider competitive effects: (a) he was not required to give this factor any particular weight, (b) he was not required to hold a hearing, and (c) there was no provision for judicial review (374 U. S. at 351). For these reasons, this Court likened the case to *California v. Federal Power Commission,* 369 U. S. 482 (1962), where there was a separate trial under the antitrust laws, and distinguished those cases where the court reviews the agency's finding of public interest, including its application of antitrust principles.[30]

The *Philadelphia National* decision, in effect, eliminated community convenience and needs as factors in adjudicating the legality of bank mergers where competition was impaired. In 1965, Senator Robertson, Chairman of the Senate Committee on Banking and Currency, introduced a bill to reverse this result. His purpose was to "call for consideration of public convenience and necessity and a final decision based on the public interest."[31]

Throughout the tortured course by which the Bank Merger Act finally evolved, proponents of legislative change strove to reinstate the factors of convenience and needs, and their opponents strove to preserve the paramountcy of antitrust considerations. The final result was a compromise. The proponents obtained a provision that the court must apply the same standards as the regulatory agency—including convenience and needs. This clearly makes relevant the policy considerations that were held irrelevant in *Philadelphia National Bank.* Their opponents obtained a

30. The most recent example is *Seaboard Air Line R. Co. v. U. S.,* 382 U. S. 154 (1965), where this Court said (pp. 156-157): "It matters not that the merger might otherwise violate the antitrust laws; the Commission has been authorized by the Congress to approve the merger of railroads if it makes adequate findings in accordance with the criteria quoted above that such a merger would be 'consistent with the public interest.'"

31. Hearings on S. 1698 before a Subcommittee of the Committee on Banking and Currency, United States Senate, 89th Cong., 1st Sess., p. 2.

provision that an anticompetitive merger may not be approved unless the public interest is clearly preponderant.

Insofar as the weight to be given to the administrative approval is concerned, the new legislation changed the three aspects of the 1960 statute to which this Court pointed in *Philadelphia National* when it held that the administrative approval under the 1960 Act should be disregarded.

> (a) The new act, unlike the old, specifies the weight which the agency must give to the factor of competition.
>
> (b) While it does not require the agency to hold a hearing [this aspect is discussed in more detail later in this brief], the new act provides for a hearing in the District Court and permits the regulatory agency to intervene, thus affording all interested parties an opportunity to be heard.
>
> (c) The new act, unlike the old, makes specific provision for judicial review during a period of 30 days following issuance of the agency's approval. After this period the merger is immune from attack under any antitrust laws other than Section 2 of the Sherman Act.

Since Congress changed the legislative features to which this Court pointed when it denied weight to the agency determination in *Philadelphia National*, the effect must be to change the result in *Philadelphia National* and to accord weight to the agency determination in the future.

That the legislators did so understand the significance of the new act is shown by the following statement in the "dissenting views" of Congressman Weltner, an opponent of the new act, printed as part of the House Report:[32]

> "*Yet these individuals* [the banking agencies] *may, under H. R. 12173, effectively repeal the antitrust*

32. H. Rep. No. 1221, 89th Cong., 2d Sess., p. 29.

laws, because the courts must of necessity rely heavily upon agency 'expertise' concerning questions of fact, even where provision is made for de novo review. If these individuals conclude that the 'convenience and needs of the community to be served' clearly outweigh a substantial lessening of competition or a tendency toward monopoly, it is highly doubtful that a court will overrule even a substantially anticompetitive merger." (Emphasis in original.)

To bolster its position in this appeal, the Department of Justice points to statements by Representative Patman, Representative Reuss and Representative Multer to the effect that they expected the District Courts to adjudicate the legality of mergers without regard to the decision of the supervisory agency (Brief for the United States, pp. 35-36). As noted in footnote 22 on page 36 of the Brief for the United States, quotations can also be cited to precisely the opposite effect. The explanation offered by a commentator in the field of antitrust and trade regulation is that:

> "When legislation enacted by Congress represents a compromise of widely divergent views, the various factions often attempt ex post facto modification of the terms of the settlement. When the compromise bill comes up for final consideration, those factions will place on the record of the debate 'explanations' and 'interpretations' of the bill that will, not unnaturally, tend to bend the compromise language in the direction of the proposal originally favored by the speaker. As indicated in the analysis ATRR published earlier this year on the 1966 Bank Merger Act, the legislative history of that statute seems to follow such a pattern." (BNA Antitrust & Trade Regulation Report, January 24, 1967, p. B-1)

The Department's quotation from Representative Patman is particularly suspect for the reason noted by the court in the San Francisco bank merger case:

"Counsel have largely confined their quotations to those from Congressmen Weltner and Todd, who opposed the bill, and from Congressman Patman who bitterly fought the legislation and finally, through a face-saving compromise, introduced the bill, while stating that if he alone were writing the bill, he 'would be against it as a matter of principle.' (Cong. Rec. Feb. 8, 1966, p. 2357). Counsel's choice of makers of remarks is not very persuasive." (*U. S. v. Crocker-Anglo National Bank, et al., supra,* at page 83,152, fn. 3)

The District Court's Assignment of Burden of Proof Is Correct.

If, as the previous sections of this brief have shown, the court below was correct in holding that this is a review proceeding, it necessarily follows that the court below was also correct in assigning the burden of proof to the Department of Justice. The Banks have already established to the Comptroller's satisfaction that factors of community convenience and needs far outweigh any possible adverse effects on competition. Now it is up to the Department of Justice to show that the Comptroller's finding of public interest violates the statutory standards. "Moreover, the [Comptroller's] order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would oppose [it] carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." *Federal Power Commission v. Hope Natural Gas Co.,* 320 U. S. 591, 602 (1944).

It likewise follows, under the *Smithfield* procedure of "review de novo," that the Department of Justice has the burden of coming forward with the evidence on all factual

issues—convenience and needs as well as competitive effects.[33]

The foregoing is dispositive of this issue, unless this Court should decide that the court below was incorrect and that a trial must ensue in which no weight whatever will be assigned to the agency determination. In that event, the Department of Justice, as the plaintiff, must bear the overall burden of persuasion to show the illegality of the merger. We do not understand the Department of Justice to dispute this.

The Department argues, however, that if there is to be a "trial de novo," convenience and needs is a statutory exception which must be proved by the Banks. The short answer to this is that convenience and needs is not an exception—the statute provides that it must be considered "in every case." Furthermore, traditional canons of statutory construction compel the conclusion that convenience and needs is a part of the plaintiff's affirmative case, rather than an exception. The authorities which support this proposition are set forth at length in the brief filed on behalf of the Houston banks in No. 914.

The Comptroller's Failure to Hold a Hearing Does Not Diminish the Weight to Be Given to His Decision.

The Department of Justice argues that it would be "anomalous" or "curious" to accord presumptive validity to the Comptroller's decision because it was made without a hearing (Brief for the United States, pp. 13, 37). The first answer to this argument is that the banking agencies have traditionally reached their determinations without

33. In the *Smithfield* case, the Court of Appeals said: ". . . the plaintiff may adduce evidence demonstrating the impermissibility of the Comptroller's approval of a branch bank at Smithfield. Testimony to the contrary will be receivable from the Comptroller. The Court will then find the facts. Thereon, it will judge de novo the validity, in fact and in law, of the Comptroller's final action" (352 F. 2d at 272).

formal hearings; and this procedure, far from being criticized, has received widespread approval. The Eighth Circuit Court of Appeals, in *Northwest Bancorporation v. Board of Governors of the Federal Reserve System*, 303 F. 2d 832, 843 (8th Cir. 1962), quoted with approval the following passage from Davis, Administrative Law Treatise:

> "Probably the outstanding example in the federal government of regulation of an entire industry through methods of supervision, and almost entirely without formal adjudication, is the regulation of national banks. * * * The system may be one of the most successful, if not the most successful."

The Fourth Circuit Court of Appeals, in *Smithfield*, said:[34]

> "Furthermore, the uniform administrative practice of the Comptroller for a hundred years has sanctioned his present course. True, his own regulations had permitted an adversary hearing, but resort to these rules was entirely at his option. 12 C. F. R. § 4.8(d), (e)(1963)." (352 F. 2d at 270)

The District Court for the Southern District of New York in *Manufacturers Hanover* said:

> "We think that the lack of adversary hearings in this case is of no practical significance because the material evidentiary facts were before the Board, and they were, and still are, largely undisputed. Thus, there was nothing to hear but argument, and the Attorney General provided that in his written report." (240 F. Supp. at 885)

The Attorney General himself advised Congress in connection with the Bank Merger Act of 1966 that "there are important considerations that make the more summary

34. See also, *Webster Groves Trust Company v. Saxon*, opinion of the Eighth Circuit Court of Appeals dated December 14, 1966, reported in 35 L. W. 2348.

handling of merger applications particularly appropriate" (Letter of the Attorney General dated September 24, 1965, H. Rep. No. 1221, 89th Cong., 2d Sess., p. 10).

The reasons for not holding hearings are obvious. The decision to approve or disapprove a bank merger turns on the financial statements of the banks which are verified by the bank examiners, economic data which is a matter of public knowledge, and banking policy considerations which are part of the administrative expertise. These factors are rarely in dispute. The regulatory agency receives advisory opinions from the other agencies and the Attorney General as to the effect of the merger on competition and needs no hearing on this point. The other ingredients in the agency's determination, such as the strengths and weaknesses of the banks and their alternatives if the merger is disapproved must be treated in confidence. Disclosure may precipitate the untoward effects the merger is designed to prevent.[35] The Bank Merger Act of 1966 obviates the necessity for a public hearing in undisputed cases and postpones the hearing in disputed cases to the setting of a District Court, where confidential testimony can be fully protected.

The second answer to the Department's argument with respect to the lack of a hearing is that, in an appropriate case, a hearing can be, and is, accorded by the agency or ordered by the court.[36] The Comptroller held a full, evidentiary type hearing on his own motion in the San Francisco bank merger case, before the passage of the Bank Merger Act of 1966. Later, after the passage of the Act,

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35. See colloquy between Senators Bennett and Robertson, agreeing that a public hearing may be "very dangerous" and may "defeat the whole thing." (Hearings on S. 1698 before a Subcommittee of the Committee on Banking and Currency, United States Senate, 89th Cong., 1st Sess., p. 215.)

36. Section 3 of the Bank Merger Act provides for publication of notice of any proposed merger, thus affording interested parties an opportunity to make their positions known to the banking agency before the agency acts on the merger application (Banks' Appendix 2b).

the California District Court ordered him to hold a second hearing to consider the implications of the new legislation. *U. S. v. Crocker-Anglo National Bank, supra,* at p. 83160. It is noteworthy that the Department of Justice declined to participate in either hearing, although invited to do so.

The Disagreement Between the Department of Justice and the Regulatory Agency Can Best Be Settled Under the District Court's Interpretation of the Statute.

The final argument in the Brief for the United States is that the bank regulatory agencies—or at least the Comptroller of the Currency—are disregarding the statutory standards and the intent of Congress by giving too little weight to the competitive factors in passing upon bank merger applications. The Comptroller has, an occasion, expressed the opposite view—that the Department gives too little weight to the public interest. This disagreement between two agencies of the government deeply concerned the court below, and the court's ruling establishes the only feasible method of reconciling their divergent views.

Reconciliation between the banking agencies and the Department will never be achieved by having each side try the case de novo, separately from the other. The traditional method is to prescribe precise standards to govern the agencies' decisions, to subject those decisions to judicial review at the request of the Department, and to set them aside if they violate the statutory standards or are otherwise arbitrary, capricious or unreasonable.

That is the scheme of the Bank Merger Act of 1966 as interpreted by the court below.

Conclusion: The Judgment Below Should Be Affirmed Without Remand.

The Department of Justice has staked its case on its contention that the Bank Merger Act requires a trial de novo. When the court below rejected this contention,

the Department made no effort to take an interlocutory appeal. When the Banks filed their motion for final judgment, the Department made no effort to preserve a right to remand in the event the judgment was upheld. At a hearing in chambers after the motion was filed, when the court reminded counsel for the Department that pretrial orders defining the issues are binding, counsel agreed that such was the case (Transcript of Hearing, December 12, 1966, p. 6-7). There can be no doubt that, if the District Court's interpretation of the Bank Merger Act is upheld, the judgment of the District Court should be affirmed without remand. The Brief for the United States does not suggest to the contrary.

Rule 41(b), under which the judgment was entered, provides that, unless the court in its order of dismissal otherwise specifies, the dismissal "operates as an adjudication upon the merits."[37] In this case, far from specifying otherwise, the court below ordered that the dismissal should be "with prejudice." In so doing, the court below was following this Court's direction in *Costello v. United States*, 365 U. S. 265, 286 (1961):

> "We do not discern in Rule 41(b) a purpose to change this common-law principle with respect to dismissals in which the merits could not be reached for failure of the plaintiff to satisfy a precondition. All of the dismissals enumerated in Rule 41(b) which operate as adjudications on the merits—failure of the plaintiff to prosecute, or to comply with the Rules of Civil Procedure, or to comply with an order of the Court, or to present evidence showing a right to the relief on the facts and the law—primarily involve situations in which the defendant must incur the inconvenience of preparing to meet the merits because there is no initial bar to the Court's reaching them. It is therefore logical that a dismissal on one of these

37. See *Safeway Stores v. Fannan*, 308 F. 2d 94, 99 (9th Cir. 1962).

grounds should, unless the Court otherwise specifies, bar a subsequent action. In defining the situations where dismissals 'not provided for in this rule' also operate as adjudications on the merits, and are not to be deemed jurisdictional, it seems reasonable to confine them to those situations where the policy behind the enumerated grounds is equally applicable. Thus a *sua sponte* dismissal by the Court for failure of the plaintiff to comply with an order of the Court should be governed by the same policy. Although a *sua sponte* dismissal is not an enumerated ground, here too the defendant has been put to the trouble of preparing his defense because there was no initial bar to the Court's reaching the merits."

II. If the Case Is Reversed and Remanded to the District Court, That Court Should Decide Whether to Stay the Merger Pendente Lite.

At the same time that it dismissed the case with prejudice, the court below ordered that the statutory stay of the merger under the Bank Merger Act be lifted, permitting the Banks to merge on and after January 18, 1967. On January 9, the Department of Justice applied to this Court for a stay of the merger pending appeal. On January 11, the Banks filed a memorandum (and supporting papers) in opposition to the Department's application. On January 16, Mr. Justice Brennan ordered the Banks to refrain from consummating their merger pending final determination of the appeal.

The Department has raised the question, what would be the status of the stay if this Court were to reverse and remand?

The Banks have found no precedent for this situation. They suggest that, upon remand, this Court should instruct the District Court to consider de novo the propriety of a further stay, basing such consideration on the motions and memoranda filed by the parties in this Court and such

supplementary evidence or testimony as the parties may submit. The reason for this suggestion is that the Banks' memorandum opposing the stay was grounded on a factual affidavit of their Presidents showing that the stay will not accomplish its purpose of maintaining the status quo and may destroy the merger.[38] The affidavit also showed that if the merger is consummated now and is later held to be illegal, the District Court will be able to grant effective relief through sale of branches and other saleable assets. There was no opportunity for this Court to hear argument on these factual issues or to give them detailed consideration. They should be considered by the District Court before any additional stay is granted.

Respectfully submitted,

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Dated: February 16, 1967.

38. The Banks' memorandum opposing the stay, together with the supporting affidavit, is printed in the Banks' Appendix at 274b.

SUPPLEMENT.

A STATEMENT OF POLICY OF THE COMPTROLLER OF THE CURRENCY.

(102nd Annual Report to Congress, 1964)

The nation's industry and commerce are alive with change. If the banking industry is to serve their needs most effectively, it will have to match the initiative and imagination displayed elsewhere in the economy. The temper of the banking industry, and the energy with which new opportunities are created and pursued, will be critically affected by the attitudes of the public authorities. A negative or unreceptive outlook on the part of the regulator may dampen the initiative of banks and impede effective response to public demand for banking services and facilities.

For nearly four years, we have been engaged in an effort to broaden the opportunity for private initiative in the National Banking System, insofar as this could properly be done in the light of existing law and the public purpose to sustain and safeguard the viability of the banking system. In our 101st Annual Report to the Congress, we reviewed the changes that were instituted and those advocated with respect to the operating powers of National Banks. In this 102nd Annual Report, we shall examine the changes of policy and practice relating to the structure of the National Banking System.

The banking structure that is most ideal in terms of the public need will vary with the changing requirements for banking services and facilities. Like the operating powers of commercial banks, the structure of the banking industry must continuously be adapted to emerging demands and opportunities.

All of the forces of change which are at work throughout the economy, both domestic and international, influence the ideal banking structure to be sought. In our prosperous and vigorous society these changes are constant, far-reaching, and of compelling importance. Increases in personal income and population affect the volume of savings seeking productive uses. The growth of capital and advances in technology bring new products and new industries. These, in turn, often give rise to new communities and shifts of population. Population movements are further accelerated as income levels rise and permit the purchase of new homes. All of these factors have worked to produce demands for additional types of banking services and for banking facilities at new locations. The responses by the banks and the banking authorities to these new demands and opportunities have molded the evolution of the banking structure.

"Structure" is a term generally used to describe the composition and dispersion of an industry, geographically, by size of unit, and by the range of products manufactured and distributed. The structure of an industry is also affected by the ease with which new firms may enter and existing firms may expand. In all industries, structure is influenced by such factors as the location of the materials of production, the accessibility of markets, and production and demand conditions, as well as by unique factors such as the inventive process and enterpreneurial initiative Banking, however, and the other regulated industries, differ fundamentally from the unregulated industries in one significant respect—the influence of government on structure.

In the unregulated industries, the influence of government on structure is at a minimum. In these industries, the broadest scope is preserved for individual initiative; public controls are, for the most part, either indirect or peripheral. Except in unusual times such as war, it is rare in the unregulated industries to impose precise and positive rules of conduct for the individual. He is for-

bidden to engage in certain practices and certain governmental activities may indirectly affect the choices he makes, but beyond these limiting factors he has a free choice of entry and free discretion to select his own investment, production, and marketing policies. For example, although the total supply of money and credit is regulated, the government does not normally allocate their uses nor fix the prices of goods and services produced and sold. Collective bargaining is required, but wage rates are not fixed. Anti-competitive accretions of market power and deceptive practices are controlled, but there is no effort through public authority to select and enforce any exact set of competitive conditions.

This is in clear contrast to the public policies followed in the regulated industry of banking. In vertually every significant aspect, the structure of the banking industry is directly controlled by government. Entry into banking is restricted and the expansion of existing banks is closely regulated. No bank may be formed without a charter from the government. No bank may expand its size through the acquisition of new capital or the formation of new branches without the sanction of a public authority. No bank may expand through the acquisition of other banks without the prior approval of government.

Underlying this intercession of government in banking is a basic public policy that sets this industry clearly apart from others. The factor which distinguishes banking from other industries is the public concern to safeguard the viability of the banking system. This concern is founded upon the central role which banking performs in the economy, and the critical significance of public confidence in the banking system. The banking system provides the chief instrument of payment in the conduct of business and private transactions, and it represents one of the principal channels through which savings are directed to productive uses. In order that these functions may be performed effectively, there must be public confidence in the banking system.

Without such confidence, funds would not be deposited in banks nor would checks be accepted in payment of transactions, and the performance of the entire economy would be greatly impaired.

There are three basic forms of public control that affect the structure of the banking industry: (1) chartering controls; (2) branching controls; and (3) merger controls.

A. *Chartering Controls*

The imposition of entry controls through the requirement of a public charter represents the most fundamental structural regulation of the banking industry. In the unregulated industries, freedom of entry is preserved as the essential basis for the reliance placed on private initiative to exploit profitable opportunities for serving consumer demands, and generally to make certain that productive resources move to their best uses throughout the economy. It is recognized that free entry may result in the elimination of inefficient competitors, but this is regarded as a small price to pay for the public benefits of private initiative and innovation. Failures in banking, however, are considered to be of greater public consequence than failures in other industries because of the broad effects on confidence in the banking system and the severe incidence on individuals and small business firms. Entry restrictions have thus been adopted as one of the measures for preserving the viability of the banking system.

Since the existence of entry restrictions deprives the public of the full benefits of competition in meeting consumer demands, it becomes the responsibility of the regulatory authorities to make certain that entry controls are not so severely administered as to inhibit the provision of needed banking services and facilities. If the public authorities are insufficiently alert or sluggishly responsive to emerging requirements, artificial shortages may appear. This is precisely the situation which prevailed several years

ago as a result of postwar changes in the size and location of population and industry.

Shortages of supply normally create mounting pressures for market entry in a capital-rich and dynamic economy such as our own. This poses administrative problems where there is a public control of entry. As the saturation point is approached in a market under the pressure of new entry, it becomes increasingly difficult to make accurate estimates of need and potential profitability. Moreover, in order to sustain the viability of the banking system, it is desirable to preserve opportunities for new banks to grow to efficient size. For these reasons, a temporary halt may occasionally be required in the chartering of new banks in some markets, as occurred under the more responsive chartering policies of the past several years.

Some observers have been concerned lest the chartering of new banks should proceed so far as to increase the rate of bank failures, and it is worthwhile to consider how firm the safeguards against failure should be in the chartering of new banks. It must be remembered that bank entry is regulated not because there is a private right of existing banks to be protected against competition, but because there is a public concern to sustain the viability of the banking system. It can never be in the public interest to protect banks against competitors who are either more efficient or more responsive to public demands. There are, moreover, positive public benefits to be derived through the periodic introduction into the banking industry of new competitive forces with fresh ideas and fresh talents.

An absolute safeguard against bank failures resulting from new entry would require an absolute bar against entry, for any new competitor will have some effect on his rivals and will himself run the risk of failure. In order to reconcile the need to protect the viability of the banking system with the equally vital need to assure sufficient production of banking services, a unique combination of public policies has been adopted. Applications for entry are care-

fully screened in terms of public demand, potential profitability, and effects upon competitors. In order to assure the capability of new banks to operate efficiently and effectively, certain minimum capital requirements are imposed, and the competence of proposed management is appraised and approved by the regulatory authorities. The operating policies and practices of all banks are continuously supervised to sustain their solvency and liquidity. Finally, as an ultimate safeguard where failure does occur, a system of deposit insurance has been provided. Through these measures, confidence in the banking system is preserved without paralyzing the competitive forces. Thus, the banking industry is enabled to undertake the risks that are required in serving the demands of a thriving and flourishing economy.

The chartering of new banks represents, in many respects, the most delicate task which confronts the bank regulatory authorities. A new bank represents a new competitor, and a new competitor is rarely welcome in any industry. On the other hand, since bank charters are valuable because they are limited in supply, they are actively sought by competing applicants. The public authorities are thus subjected to intensive pressures both from those who seek charters and those who oppose them. Moreover, in reaching decisions on charter applications, there can be no absolute certainty of the fate that will befall new banks or their competitors.

Despite these difficulties of administering entry controls, banking must not be treated as a "closed" industry. Each new generation produces a new group of men and women of skill and ability seeking outlets for the use of their talents, and in our prosperous society there is a constant accumulation of capital in search of profitable employment. In some measure, these new productive resources will find their best uses in the banking industry, and the public will benefit by allowing them access to that industry.

B. *Branching Controls*

The second principal form of structure control is the regulation of branching. A bank may expand internally through the formation of *de novo* branches, or externally through the absorption of other banks by means of merger. Merger controls, however, raise a number of separate issues and will be discussed in the next section.

The policy issues confronted in branching are in many respects similar to those which appear in the chartering of new banks. Since the formation of a *de novo* branch introduces a new competitor into a market, the same questions arise of public need or convenience, potential profitability, and effects upon competitors. But inasmuch as branching increases the size of an individual bank, new issues also emerge concerning the potential for greater operating efficiency and for enlargement of the range of services offered to consumers.

There will be some circumstances in which a new branch will be able to serve public demand to better advantage than a new bank. Some banking markets can profitably support a new branch where a new bank could not prosper. A new branch may be able to bring to a community a broader range of services than could be efficiently provided by a newly chartered bank. Moreover, the abandonment of a branch will be less harmful—both to the parent bank and to the banking system—than the failure of a new bank; thus, where prospects are not immediately certain, or where expansion is based partially on anticipated growth in demand, branching might be the preferred course. The choice of whether to provide for bank expansion through new charters or through new branches is also affected by other considerations which are discussed in the next two sections.

Much of the recent demand for new branches, as has been true of that for new charters, stems from the growth and shifts of population and the creation and relocation of industries. Very commonly in recent years, for example,

the movement of population from urban to suburban areas has deprived urban banks of customers and created new demands in suburban areas. Moreover, the growth of new industries often gives rise to new working and residential communities with new needs for banking services and facilities. Through branching, a bank may "move with its customers" and retain its position in the industry. The broader the geographic dispersion of a bank's offices, the more readily may the deposits from surplus areas be put to effective use in areas where loan demand exceeds the deposits generated. Further, by increasing its size, branching may enable a bank to produce some services at lower cost. It may also enable a bank to spread its risks more effectively and thus allow engagement in lending activities that would not be feasible for a smaller bank. A larger bank, moreover, has a larger legal lending limit and so may serve certain classes of customers more effectively than smaller banks.

In the unregulated industries, the economies of scale actually realized, and the variety of services actually performed, are determined competitively. In banking, however, the regulatory authorities have the ultimate responsibility to choose the means of bank expansion best calculated to serve the public interest. Their decisions will inevitably affect the prices and range of products and services offered to consumers.

The authority to permit the formation of branches is much more severely restricted than the power of the regulatory authorities to allow the creation of new banks. These long-standing traditions with respect to branch banking have had a deep-seated and far-ranging effect upon the entire banking structure of the country, and upon the performance of the banking system. They have greatly enlarged the number of banks, hampered the growth of banks to most efficient size, inhibited the development of specialized services by many banks, and diminished the effectiveness and efficiency of the banking system in the

vital task of facilitating the movement of capital to its best uses throughout the Nation. In some degree, these limitations have been overcome through the solicitation of loans and deposits in areas beyond the powers to branch, and through the establishment of affiliates, satellites, or holding companies. These, however, represent generally inferior means for the expansion of banking operations.

There is the mistaken belief that broader authority to permit branching would lead to harmful effects upon competition in the banking industry. Greater power to allow the formation of branches, however, would merely add to the discretionary authority of the regulatory agencies. Equipped with a more extensive range of alternatives, the banking authorities would be in a better position to choose the precise means of bank expansion most suitable to serve the needs of individual banking markets, and most likely to provide the required services and facilities at the least cost. Indeed, the risk of monopoly power is greatest where the greatest reliance is placed on unit banking. Since new branches might be able to operate profitably in markets where new unit banks could not survive, the prohibition of branching would exclude potential competitive forces from these markets.

There is no consideration of the public interest which would justify an absolute withholding of the branching tool from the regulatory authorities. The only proper basis for the restriction of branching is the suitability of this means of bank expansion to serve emerging public demands in particular banking markets. Under this principle, the regulatory authorities should have the full discretion to authorize the formation of branches wherever they can serve the public interest to best advantage.

C. *Merger Controls*

The third means by which government influences the banking structure is through direct administrative control of mergers. In the unregulated industries mergers may be

freely undertaken, subject only to prosecution under the antitrust laws. In banking, however, mergers require the prior administrative approval of a regulatory authority, and the regulatory agencies in reaching their decisions apply a variety of statutory criteria relating to the banking and public consequences of proposed mergers.

The desire to merge is critically affected by the power to branch. Merger applications rarely appear in no-branch States because a merger under those conditions usually requires the closing of one of the merged banks. Thus, two tools of structure control are effectively lost where branching is prohibited, and needed bank expansion must take place almost entirely through new charters.

The public benefits which may be derived from mergers stem basically from the economies of large-scale enterprise, and the greater variety of services which larger firms may offer to consumers. These benefits will arise where increases in the scale of operations yield savings in costs, or where a broadening in the lines of production or the extension of operations to new markets permit greater dispersion of risks and thus allow the undertaking of ventures unsuitable for smaller firms. A larger and more broadly based bank may also be able to offer specialized services which are not profitable for smaller institutions, and should be able to move capital more efficiently from surplus to deficit areas. Moreover, the legal lending limits of banks require the presence of larger institutions to meet the needs of larger businesses most proficiently.

In our public policy for the unregulated industries, we have generally distinguished between the growth of firms through internal expansion and their growth through merger. Growth through merger has been viewed with greater public concern because it entails the elimination of competitors and, for this reason, merger limitations have been imposed through the antitrust laws. The direct administrative controls applied to bank mergers are also based in part upon the competitive effects of such mergers,

but, as we shall see, the banking authorities apply a variety of other public interest criteria in deciding bank merger cases. These criteria are specifically related to the fact that the banking structure is under direct public control.

There is some probability that growth through merger may have a more adverse effect on the liveliness of competition than growth through internal expansion. However, there are countervailing considerations. A merger may enable a firm to acquire plant, personnel, and market-access not otherwise readily attainable, or attainable only at greater cost. More fundamentally, even though the intensity of competition may be adversely affected by growth through merger, merger may nevertheless produce benefits of larger-scale production which are in some degree passed on to consumers in the form of improved service or lower prices. The task of public policy is to allow those increases in the size of firms that are, on the whole, beneficial to consumers, while restricting those that are, on balance, harmful.

There are two reasons why merger may often be the preferred course of expansion in banking, even though in comparable circumstances reliance on internal growth may be more appropriate for the unregulated industries.

First, the banking authorities have a positive responsibility to see that the public convenience and need for banking services and facilities are met. In carrying out this responsibility, they do not have the authority to require the provision of service such as is found in the fully regulated industries like the "public utilities"; their choices are limited to the private proposals for bank expansion presented for their approval. If they find that a proposed merger will yield public benefits and they see no superior means for achieving these benefits either at hand or in clear prospect, they have a strong positive reason for approving the merger. In the unregulated industries, there is no public responsibility to fashion industry expansion according to the public need; reliance is placed on private initia-

tive and no public authority faces the problem of choosing the form or method of industry growth.

Second, in choosing the *best* means to serve the public convenience and need for banking services, the banking authorities must appraise the alternatives in terms of the effects on the solvency and liquidity of competing banks. Bank merger proposals are generally designed to provide new services to a community, to provide services at lower cost, or to enter new markets. The alternative means of achieving these purposes are new charters and *de novo* branching. If the existing banks in a market are poorly managed, financially weak, or unprogressive, such added competition may threaten their solvency or liquidity and merger may constitute the only effective means of bringing improved service to a community without posing a threat to bank viability.

In the unregulated industries, there is no public concern to safeguard individual firms against failure. Indeed, in these industries freedom to compete and to eliminate less efficient rivals is essential to the reliance placed on private initiative to serve consumer demands. It is therefore appropriate in the freely competitive industries to impose more severe restrictions on growth through merger than are applied to banking.

Bank mergers have sometimes been opposed on the ground that, although they may improve service for some classes of consumers, they may do so at the expense of others. Some classes of consumers, however, have needs which only larger banks can serve efficiently. If other classes of consumers are disadvantaged by a merger, a new opportunity is presented to competing banks and the banking authorities may respond by authorizing new charters or new branches. In this way, the needs of *all* classes of bank customers may be served most efficiently and most effectively.

The Bank Merger Act of 1960 provided for direct administrative control of bank mergers by the banking au-

thorities, and established broad public interest standards to guide the administration of these controls. In addition to the "effect of the transaction on competition (including any tendency toward monopoly)," the banking agencies are required to consider the financial history and condition of each of the banks involved, the adequacy of their capital structures, their future earnings prospects, the general character of their management and, most significantly, "the convenience and needs of the community to be served." Mergers are to be approved only where, after considering all of these factors, the transaction is found to be "in the public interest." Since the passage of the Bank Merger Act, however, two Supreme Court decisions have subjected bank mergers to the antitrust laws. This has given rise to ambiguities of policy and conflicts of purpose.

The problems are both philosophic and procedural. There is no serious dispute about the desirability of applying antitrust principles to the unregulated industries. Since in those industries primary reliance is placed on individual initiative and private enterprise to meet consumer demands, there are justifiable reasons for preserving freedom of entry and restricting the acquisition of market power in order to enable the competitive forces to function. In banking, however, entry and expansion are under direct public control. The competitive forces are purposefully restricted in order to safeguard the viability of the banking system, and an effort to apply conventional antitrust principles in these circumstances is almost certain to conflict with bank regulatory objectives.

This is well demonstrated by the difficulties that have been encountered under the Bank Merger Act since the *Philadelphia* and *Lexington* decisions brought bank mergers under the antitrust laws. Although the banking agencies must continue to reach their decisions according to the broader public interest standards set forth in the Bank Merger Act, their decisions are now subject to attack in

the courts under the narrower standards of the antitrust laws.

This impasse can be clearly resolved only by exempting bank mergers from the antitrust laws completely as has been done in other regulated industries, or by subjecting such mergers to the full application of those laws. If this latter course is chosen, the Bank Merger Act should be repealed. There would seem to be no valid reason for subjecting banks to more onerous premerger requirements than apply in the unregulated industries if bank mergers are to be subject to attack under the antitrust laws. More fundamentally, if it is to be public policy to apply conventional antitrust concepts to banking, it logically follows that bank entry and bank branching should also be free of direct public control. The least satisfactory course, is the present one of entrusting regulatory powers to the banking agencies and judging the exercise of those powers on the assumption that the competitive forces are to be fully preserved and fully operative. It should be observed, however, that a decision to move toward free bank entry and expansion raises questions which go beyond the problems of banking structure. It is highly doubtful that bank operating practices could be effectively supervised, and the viability of the banking system sustained, without some form of public control over the banking structure.

There is one intermediate course through which a reconciliation might be achieved between the Bank Merger Act and the antitrust laws without a statutory change. The courts, in antitrust cases involving bank mergers, could take cognizance of the fact that banking competition is restricted through public regulation, and that bank mergers receive prior administrative approval from a public authority according to broad public interest standards which transcend purely competitive considerations. This approach would not be as clear-cut as the other alternatives we have presented, and would undoubtedly leave large areas of uncertainty for long periods. Nevertheless, if in

bank merger cases the courts considered the unique competitive conditions which prevail in the regulated industry of banking, there would be a greater likelihood that the antitrust criteria developed principally with the unregulated industries in mind could be adapted to banking without impairing the effectiveness of bank regulation. An effort to test this approach for accommodating these two basic strands of our public policy was recently undertaken by the Comptroller of the Currency as an intervening defendant in an antitrust action relating to the merger of the Mercantile Trust Company N.A. and the Security Trust Company, both of St. Louis.

There is one administrative procedure under the Bank Merger Act which should be modified if that Act is to remain in force. At present, the banking agencies not directly involved in a merger decision are required to submit advisory opinions on the "competitive factor" to the responsible agency. Since this factor comprises only one of the seven considerations required to be taken into account, the advisory opinions do not represent a judgment on the desirability of a merger. Nevertheless, differences between the advisory opinions and the decisions on mergers have often been falsely cited as evidence of differences in merger policy among the banking agencies. Moreover, five years of experience under the Bank Merger Act have demonstrated that the advisory opinions of the banking agencies not faced with the responsibility of decision are ordinarily routine and rarely present facts or ideas unknown to the responsible agency. There seems to be no proper reason for continuing this procedure.

Retention of the Justice Department advisory opinions may appear to have greater justification. However, the role of the Justice Department in bank merger cases will ultimately rest on the resolution of the more fundamental issue of the proper applicability of the antitrust laws to the regulated industry of banking.

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APPENDIX OF APPELLEES PROVIDENT NATIONAL BANK AND CENTRAL PENN NATIONAL BANK OF PHILADELPHIA

A. RELEVANT STATUTE

Bank Merger Act of 1966

Public Law 89-356
89th Congress, S. 1698
February 21, 1966

AN ACT

To establish a procedure for the review of proposed bank mergers so as to eliminate the necessity for the dissolution of merged banks, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. 1828(c)) is amended to read:

"(c)(1) Except with the prior written approval of the responsible agency, which shall in every case referred to in this paragraph be the Corporation, no insured bank shall—

"(A) merge or consolidate with any noninsured bank or institution;

"(B) assume liability to pay any deposits made in, or similar liabilities of, any noninsured bank or institution;

"(C) transfer assets to any noninsured bank or institution in consideration of the assumption of liabilities

for any portion of the deposits made in such insured bank.

"(2) No insured bank shall merge or consolidate with any other insured bank or, either directly or indirectly, acquire the assets of, or assume liability to pay any deposits made in, any other insured bank except with the prior written approval of the responsible agency, which shall be—

"(A) the Comptroller of the Currency if the acquiring, assuming, or resulting bank is to be a national bank or a District bank;

"(B) the Board of Governors of the Federal Reserve System if the acquiring, assuming, or resulting bank is to be a State member bank (except a District bank);

"(C) the Corporation if the acquiring, assuming, or resulting bank is to be a nonmember insured bank (except a District bank).

"(3) Notice of any proposed transaction for which approval is required under paragraph (1) or (2) (referred to hereafter in this subsection as a 'merger transaction') shall, unless the responsible agency finds that it must act immediately in order to prevent the probable failure of one of the banks involved, be published—

"(A) prior to the granting of approval of such transaction,

"(B) in a form approved by the responsible agency,

"(C) at appropriate intervals during a period at least as long as the period allowed for furnishing reports under paragraph (4) of this subsection, and

"(D) in a newspaper of general circulation in the community or communities where the main offices of the banks involved are located, or, if there is no such newspaper in any such community, then in the newspaper of general circulation published nearest thereto.

"(4) In the interests of uniform standards, before acting on any application for approval of a merger transaction, the responsible agency, unless it finds that it must act immediately in order to prevent the probable failure of one of the banks involved, shall request reports on the competitive factors involved from the Attorney General and the other two banking agencies referred to in this subsection. The reports shall be furnished within thirty calendar days of the date on which they are requested, or within ten calendar days of such date if the requesting agency advises the Attorney General and the other two banking agencies that an emergency exists requiring expeditious action.

"(5) The responsible agency shall not approve—

"(A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

"(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the commuity to be served.

"(6) The responsible agency shall immediately notify the Attorney General of any approval by it pursuant to this subsection of a proposed merger transaction. If the agency has found that it must act immediately to prevent the probable

failure of one of the banks involved and reports on the competitive factors have been dispensed with, the transaction may be consummated immediately upon approval by the agency. If the agency has advised the Attorney General and the other two banking agencies of the existence of an emergency requiring expeditious action and has requested reports on the competitive factors within ten days, the transaction may not be consummated before the fifth calendar day after the date of approval by the agency. In all other cases, the transaction may not be consummated before the thirtieth calendar day after the date of approval by the agency.

"(7)(A) Any action brought under the antitrust laws arising out of a merger transaction shall be commenced prior to the earliest time under paragraph (6) at which a merger transaction approved under paragraph (5) might be consummated. The commencement of such an action shall stay the effectiveness of the agency's approval unless the court shall otherwise specifically order. In any such action, the court shall review de novo the issues presented.

"(B) In any judicial proceeding attacking a merger transaction approved under paragraph (5) on the ground that the merger transaction alone and of itself constituted a violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2), the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5).

"(C) Upon the consummation of a merger transaction in compliance with this subsection and after the termination of any antitrust litigation commenced within the period prescribed in this paragraph, or upon the termination of such period if no such litigation is commenced therein, the transaction may not thereafter be attacked in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act,

15 U.S.C. 2), but nothing in this subsection shall exempt any bank resulting from a merger transaction from complying with the antitrust laws after the consummation of such transaction.

"(D) In any action brought under the antitrust laws arising out of a merger transaction approved by a Federal supervisory agency pursuant to this subsection, such agency, and any State banking supervisory agency having jurisdiction within the State involved, may appear as a party of its own motion and as of right, and be represented by its counsel.

"(8) For the purposes of this subsection, the term 'antitrust laws' means the Act of July 2, 1890 (the Sherman Antitrust Act, 15 U.S.C. 1–7), the Act of October 15, 1914 (the Clayton Act, 15 U.S.C. 12–27), and any other Acts in pari materia.

"(9) Each of the responsible agencies shall include in its annual report to the Congress a description of each merger transaction approved by it during the period covered by the report, along with the following information:

"(A) the name and total resources of each bank involved;

"(B) whether a report was submitted by the Attorney General under paragraph (4), and, if so, a summary by the Attorney General of the substance of such report; and

"(C) a statement by the responsible agency of the basis for its approval."

(b) Section 18 of such Act is further amended by adding at the end thereof the following new subsection:

"(i)(1) No insured State nonmember bank (except a District bank) shall, without the prior consent of the Corporation, reduce the amount or retire any part of its common or preferred capital stock, or retire any part of its capital notes or debentures.

CARD 14

"(2) No insured bank shall convert into an insured State bank if its capital stock or its surplus will be less than the capital stock or surplus, respectively, of the converting bank at the time of the shareholder's meeting approving such conversion, without the prior written consent of—

"(A) the Comptroller of the Currency if the resulting bank is to be a District bank;

"(B) the Board of Governors of the Federal Reserve System if the resulting bank is to be a State member bank (except a District bank);

"(C) the Corporation if the resulting bank is to be a State nonmember insured bank (except a District bank).

"(3) Without the prior written consent of the Corporation, no insured bank shall convert into a noninsured bank or institution.

"(4) In granting or withholding consent under this subsection, the responsible agency shall consider—

"(A) the financial history and condition of the bank,

"(B) the adequacy of its capital structure,

"(C) its future earnings prospects,

"(D) the general character of its management,

"(E) the convenience and needs of the community to be served, and

"(F) whether or not its corporate powers are consistent with the purposes of this Act."

SEC. 2. (a) Any merger, consolidation, acquisition of assets, or assumption of liabilities involving an insured bank which was consummated prior to June 17, 1963, the bank resulting from which has not been dissolved or divided and has not effected a sale or distribution of assets and has not taken any other similar action pursuant to a final judgment under the antitrust laws prior to the enactment of this Act, shall be conclusively presumed to have not been in violation of any

antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2).

(b) No merger, consolidation, acquisition of assets, or assumption of liabilities involving an insured bank which was consummated after June 16, 1963, and prior to the date of enactment of this Act and as to which no litigation was initiated by the Attorney General prior to the date of enactment of this Act may be attacked after such date in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2).

(c) Any court having pending before it on or after the date of enactment of this Act any litigation initiated under the antitrust laws by the Attorney General after June 16, 1963, with respect to the merger, consolidation, acquisition of assets, or assumption of liabilities of an insured bank consummated after June 16, 1963, shall apply the substantive rule of law set forth in section 18(c)(5) of the Federal Deposit Insurance Act, as amended by this Act.

(d) For the purposes of this section, the term "antitrust laws" means the Act of July 2, 1890 (the Sherman Antitrust Act, 15 U.S.C. 1–7), the Act of October 15, 1914 (the Clayton Act, 15 U.S.C. 12–27), and any other Acts in pari materia.

SEC. 3. Any application for approval of a merger transaction (as the term "merger transaction" is used in section 18(c) of the Federal Deposit Insurance Act) which was made before the date of enactment of this Act, but was withdrawn or abandoned as a result of any objections made or any suit brought by the Attorney General, may be reinstituted and shall be acted upon in accordance with the provisions of this Act without prejudice by such withdrawal, abandonment, objections, or judicial proceedings.

Approved February 21, 1966.

B. PROCEEDINGS BEFORE COMPTROLLER

Application and Economic Brief

COMPTROLLER OF THE CURRENCY
WASHINGTON, D. C.

Application
For Approval to Merge

Date Filed: December 3, 1965

Central-Penn National Bank of Philadelphia		
(Charter or Buying Bank)		(City)
Philadelphia	Pennsylvania	723
(County)	(State)	(Charter No.)

and

Provident National Bank		Philadelphia
(Other Bank)		(City)
Philadelphia	Pennsylvania	15422
(County)	(State)	(Charter No.)

UNDER THE CHARTER OF

Central-Penn National Bank of Philadelphia

AND WITH THE TITLE

Provident National Bank

PURSUANT TO THE ATTACHED CERTIFIED COPIES OF RESOLUTIONS OF THE BOARDS OF DIRECTORS OF THE ABOVE BANKS, AND IN ACCORDANCE WITH THE ATTACHED AGREEMENT, APPLICATION IS HEREBY MADE FOR APPROVAL OF THE PROPOSAL AS REQUIRED BY THE PROVISIONS OF 12 U.S.C., 1828(c), AND 12 U.S.C., 215, OR 12 U.S.C., 215a.

Costs

The applicants have agreed among themselves and it is understood that the cost of any necessary examination or

investigation resulting from this application will be borne by the resulting bank.

Broker or Finders Fee

In connection with the proposed transaction, there has been no payment, nor is there any commitment, agreement, or understanding, oral or written, to pay any consideration, fee or commission, monetary or otherwise, to any shareholder, director or officer of either bank, or to any individual or organization acting as broker, finder, negotiator, or in any similar capacity.

Public Document

It is understood and agreed that this application may be made public in a public hearing or otherwise at the discretion of the Comptroller.

Additional Information

Applicants agree to provide additional information upon request of the Comptroller.

Counsel

In connection with this proposal, the banks have consulted with, relied on, or retained the following legal counsel:

Frederic L. Ballard, Esq.,	Ballard, Spahr, Andrews & Ingersoll
(Name of Counsel)	(Firm)
1035 Land Title Building, Philadelphia, Pa. 19110	215 - 567-5615
(Address)	(Area Code — Phone)

Contact Officer

Additional details concerning this proposal may be obtained from

William B. Carr	Executive Vice President
(Name)	(Title)
Provident National Bank Broad and Chestnut Streets, Phila, Pa. 19110	215 - 564-3000
(Address)	(Area Code — Phone)

Branches of the resulting bank to be established in conjunction with this proposal (including present Head Office of Charter Bank), for which application is hereby made, are as follows:

Popular Name	*Exact Street Address*	*City, Town or Village*	*Penna. County*	*Date Established*	*Population of City, Town or Village*	*19-*
Broad & Walnut	Broad and Walnut Sts.	Philadelphia	Philadelphia	1950	2 075 000	'65
Arch Street	1710 Arch St	"	"	1950*a)	"	"
7th Street	7th & Chestnut Sts.	"	"	1930*	"	"
Pine Street	2nd & Pine Sts.	"	"	1952*	"	"
South Phila.	Broad & Passyunk Ave.	"	"	1930*	"	"
North Phila.	Broad & Glenwood Sts.	"	"	1930*	"	"
Wyoming	5th & Wyoming Ave.	"	"	1955*	"	"
Stenton	Stenton Ave & Allens Lane	"	"	1962	"	"
Woodland	65th & Woodland Ave.	"	"	1952*	"	"
Cobbs Creek	58th & Baltimore Ave.	"	"	1952*	"	"
Overbrook	6008 Lansdowne Ave.	"	"	1952*	"	"
Lancaster	62nd & Lancaster Ave.	"	"	1958	"	"
Twelfth St.	21 South 12th St.	"	"	1950*	"	"
17th & Chestnut	17th & Chestnut Sts.	"	"	1928	"	"
12th & Chestnut	12th & Chestnut Sts.	"	"	1928*	"	"
4601 Market	4601 Market Street	"	"	1926	"	"

* Date acquired in connection with merger or purchase of assets.
(a—Relocated in 1954

Popular Name	Exact Street Address	City, Town or Village	Penna. County	Date Established	Population of City, Town or Village 19-	
Spring Garden	6th & Spring Garden Sts.	Philadelphia	Philadelphia	1948*	2 075 000	'65
3701 N. Broad	3701 N. Broad Street	"	"	1954	"	"
Market St.	Juniper & Market Sts.	"	"	1957*	"	"
The Mall	4th & Chestnut Sts.	"	"	1957*	"	"
W. Phila.	19 S. 52nd St.	"	"	1957*	"	"
Germantown	150 W. Chelten Ave.	"	"	1957*	"	"
Logan	Broad & Louden Sts.	"	"	1957*	"	"
Juniata	Erie & I Sts.	"	"	1957*	"	"
Food Distribution Center	330 Packer Avenue	"	"	1959 b)	"	"
West Oak Lane	78th & Ogontz Aves.	"	"	1961	"	"
Frankford	4356 Frankford Ave	"	"	1964*	"	"
Tioga	3314 Germantown Ave.	"	"	1964*	"	"
Cottman	2200 Cottman Ave.	"	"	1964*	"	"
Lawncrest	6705 Rising Sun Ave.	"	"	1964*	"	"
Somerton	11830 Bustleton Ave	"	"	1964*	"	"
N.E. Boulevard	2401 Welsh Road	"	"	To Open Jan 1966	"	"

(b—Relocated in 1964

* Date acquired in connection with merger or purchase of assets.

Popular Name	Exact Street Address	City, Town or Village	Penna. County	Date Established	Population of City Town or Village 19-	
Springfield	Balto Pike & West Ave	Springfield	Delaware	1964	28 365	'64
Media	State St & South Ave	Media	"	1955*	6 670	"
Swarthmore	Chester Rd & Rutgers Ave	Swarthmore	"	1955*	6 162	"
Springfield	Saxer Ave & Hart Lane	Springfield	"	1955*	28 365	"
Nether Providence	Balto Pike & Beatty Rd	Wallingford, Nether Prov. Twp	Delaware	1955*	11 981	"
Lima	Balto Pike & War Admiral La.	Lima, Middletown Twp	Delaware	1961	12,330	"
City Line	City Line & Belmont Ave,	Bala Cynwyd Lower Merion Twp	Montgomery	1958 c)	66 000	65
King of Prussia	Park Office Bldg, King of Prussia Industrial Park	King of Prussia, Upper Merion Twp	"	1964	23 000	"
Ambler	132 E. Butler Pike	Ambler	Montgomery	1956*d)	6 800	"
Collegeville	364 Main Street	Collegeville	Montgomery	1960*	2 610	"
Gladwyne	950 Youngsford Road	Gladwyne, Lower Merion Twp	Montgomery	1963	66 000	"
King of Prussia	Store 10—Building "E" King of Prussia Plaza	King of Prussia Upper Merion Twp	"	1963	23 000	"

* Date acquired in connection with merger or purchase of assets.
(c—Relocated in 1959
(d—Relocated in 1963

Popular Name	Exact Street Address	City, Town or Village	Penna. County	Date Established	Population of City Town or Village 19-	
Upper Dublin	3616 Welsh Road	Willow Grove Upper Dublin Twp	Montgomery	1965	16 935	'65
Levittown	Country Club Shopping Ctr. Rte 1	Levittown Middletown Twp	Bucks	1958*	28 347	"
Langhorne	118 S. Bellevue Ave	Langhorne	Bucks	1958*	1 984	"
Newtown	Washington Ave & State St.	Newtown	Bucks	1958*	2 408	"
Morrisville	Pennsbury Plaza Shpg Ctr Rte 13, W. Trenton Ave	Morrisville	Bucks	1962	7 978	"
Street Road	Bucks County Mall	Feasterville, Lower Southampton Twp	Bucks	1964	17 069	"
Southampton	Southampton Shpg Ctr 2nd St. Pike	Southampton, Upper Southampton Twp	Bucks	1963	11 938	"
Feasterville	Bustleton Pike & Does La	Feasterville, Lower Southampton Twp	Bucks	1958*	17 069	"
Penndel	133 S. Bellevue Ave	Penndel	Bucks	1958*d)	2 309	"
Quakertown	224-228 W. Broad St	Quakertown	Bucks	1957*	6 750	"
Sellersville	209 N. Main St.	Sellersville	Bucks	1957*	2 550	"

* Date acquired in connection with merger or purchase of assets.
(d—Relocated in 1963

Attachments

Attached and made part of this application are:

1. Schedule I - (statement of assets and liabilities)
2. Schedule II - (analysis of loan and deposit accounts)
3. Schedule III - (bases for this proposal)
4. Schedule IV - (adjustments)
5. Schedule V - (future earnings prospects)
6. Economic Brief
7. Draft copy of Agreement to Merge
8. Certified copy of resolution of Board of Directors.

Attestation

The applicants hereby represent that the information contained in this application is true and complete to the best of their knowledge and belief.

Central-Penn National Bank of Philadelphia
(Charter or Buying Bank)

Harold F. Still, Jr.
President

Provident National Bank
(Other Bank)

William G. Foulke
President

SCHEDULE I.

STATEMENT OF ASSETS AND LIABILITIES
AS OF SEPTEMBER 30, 1965
(Thousands of Dollars)

ASSETS	*Charter or Buying Bank-c)*	*Other Bank*
Cash, balances with other banks, and cash items in process of collection	$ 64 149	$ 124 161
United States Government Obligations, direct and guaranteed	38 421	54 935
Obligations of States and Political Subdivisions	30 228	78 715
Other Bonds, Notes and Debentures (including $105 securities of Federal agencies and corporations not guaranteed by the United States)	206	303
Corporate Stocks (including $1 800 663-c) stock of Federal Reserve Bank)	673	7 032
Loans and discounts (including $111 300-c) overdrafts)	226 369	412 144
Federal funds sold	1 000	None
Direct lease financing	None	None
Bank premises owned $10 665 3 993-c)	5 445	11 540
Furniture and fixtures 875 1 452-c)		
Real estate owned other than bank premises	139	3
Advances and investments in corporations or other entities owning bank premises or other real estate	None	None
Customers' liability to this bank on acceptances outstanding	1 185	5 169
Other assets	2 564	4 695
TOTAL ASSETS	$ 370 379	$ 698 697

LIABILITIES	Charter or Buying Bank-c)	Other Bank
Demand deposits of individuals, partnerships, and corporations	$ 167 731	$ 322 325
Time and savings deposits of individuals, partnerships, and corporations	91 876	149 105
Deposits of U.S. Government (including postal savings)	12 925	15 562
Deposits of States and Political Subdivisions	20 097	57 950
Deposits of banks	22 806	47 261
Certified and officers' checks, etc.	1 829	3 309
TOTAL DEPOSITS	$ 317 264	$ 595 512
(a) Total demand deposits	$ 207 443	$ 409 004
(b) Total time and savings deposits	109 821	186 508
Mortgages or other liens $ 0	None	None
on bank premises and $ 0 on other real estate	None	None
Rediscounts and other liabilities for borrowed money	3 925	None
Federal funds purchased	4 000	None
Acceptances executed by or for account of this bank and outstanding	1 185	5 169
Other liabilities	9 927	12 272
TOTAL LIABILITIES	$ 336 301	$ 612 953
VALUATION RESERVES		
Reserve for Loan Losses	5 929	12 427
Valuation Reserves on Securities	None	None
Other Valuation Reserves	None	None
Total Valuation Reserves	$ 5 929	$ 12 427

CAPITAL ACCOUNTS	*Charter or Buying Bank-c)*	*Other Bank*
Debentures	None	None
Preferred stock—par value per share $ —	None	None
No. shares outstanding None	None	None
Common stock—par value per share 10.00-c) $ 12.00	$ 6 219	$ 14 754
No. shares authorized	750 000 Shs	1 229 518 Shs
No. shares unissued	128 545 Shs	None Shs
No. shares outstanding	621 455 Shs	1 229 518 Shs
No. of shareholders	# 5 714	# 5 823
Surplus	$ 15 899	$ 45 246
Undivided Profits	6 035	13 317
Reserves	None	None
TOTAL CAPITAL ACCOUNTS	$ 28 149	$ 73 317
TOTAL LIABILITIES AND CAPITAL ACCOUNTS	$ 370 379	$ 698 697
Time certificates of deposit outstanding	26 491	45 192

SCHEDULE II.

Analysis of Statements of Assets and Liabilities
(Thousands of Dollars)

LOANS AND DISCOUNTS	Charter or Buying Bank	Other Bank
Real Estate loans (including all loans secured by real estate, whatever the purpose):	$ 18 181	$ 23 898
(a) Secured by farm land including improvements	78	276
(b) Secured by residential properties (other than farm) and insured by Federal Housing Administration	39	3 785
(c) Secured by residential properties (other than farm) and insured or guaranteed by Veterans' Administration	29	371
(d) Secured by residential properties (other than farm) and not insured or guaranted by FHA or VA	1 890	9 794
(e) Secured by nonfarm nonresidential properties (e.g., business, industrial, hotels, office buildings, churches)	16 145	9 672
Loans to financial institutions:	18 820	46,470
(a) To domestic commercial and foreign banks	None	16 213
(b) To other financial institutions (include loans to sales finance, personal finance, insurance and, mortgage companies, factors, mutual savings banks, savings and loan associations, Federal lending agencies, and all other business and personal credit agencies)	18 820	30 257
Loans for purchasing or carrying securities (secured or unsecured):	923	23 252
(a) To brokers and dealers in securities	5	7 039
(b) Other loans for the purpose of purchasing or carrying stocks, bonds, and other securities	918	16 213

LOANS AND DISCOUNTS (Continued)	*Charter or Buying Bank*	*Other Bank*
Loans to farmers (include secured and unsecured loans to farmers, except loans secured by real estate above):	$ 45	$ 292
(a) Loans directly guaranteed by the Commodity Credit Corporation and certificates of interest representing ownership thereof	None	None
(b) Other loans to farmers (include loans for household and personal expenditures, except loans secured by real estate)	45	292
Commercial and industrial loans (include all loans for commercial and industrial purposes, secured or unsecured, except those secured by real estate above)	105 923	195 651
Loans to individuals for household, family, and other personal expenditures (exclude business loans, loans to farmers, and loans secured by real estate):	76 222	112 037
(a) To purchase private passenger automobiles on installment basis (include purchased paper)	50 845	59 805
(b) To purchase other retail consumer goods on installment basis (include purchased paper)	3 652	622
(c) Installment loans to repair and modernize residential property	1 625	839
(d) Other installment loans for household, family, and other personal expenditures	7 372	18 471
(e) Single-payment loans for household, family, and other personal expenditures	12 728	32 300
All other loans (incl. overdrafts). (To churches, hospitals, charitable or educational institution, etc, not secured by real estate)	6 255	10 544
Loans and Discounts, Gross	226 369	412 144
Less reserve for bad debts, unallocated chargeoffs, and other valuation reserves	5 929	12 427
Loans and Discounts, Net	220 440	399 717

DEMAND DEPOSITS	Charter or Buying Bank	Other Bank
Deposits of individuals, partnerships, and corporations	$167 731	$322 325
Deposits of United States Government	12 925	15 507
Deposits of States and political subdivisions	4 182	27 311
Deposits of banks	20 776	40 552
Certified and officers' checks, travelers' checks, letters of credit, etc.	1 829	3 309
TIME AND SAVINGS DEPOSITS		
Deposits of individuals, partnerships, and corporations	91 876	149 105
Deposits of United States Government $ None , postal savings deposits $ 55 .	None	55
Deposits of States and political subdivisions	15 915	30 639
Deposits of Banks	2 030	6 709
Other Time Deposits	None	None

SCHEDULE III.

Basis for Proposal

	Charter or Buying Bank	*Other Bank*	*Combined*	*Proposed for Resulting Bank*
Source of figures	Corporate Books	Corporate Books		
Date	September 30, 1965	September 30, 1965		
Total Deposits (1)	$317,264,000	$595,512,000		$911,776,000 (2)
Total Loans	$226,369,000	$412,144,000		$638,513,000
Total Fixed Assets	$ 5,445,000	$ 11,540,000		$ 16,985,000
Total Resources	$370,379,000	$698,697,000		$1,068,076,000 (2)
Number of Shares	621,455	1,229,518		2,260,813
Par Value Per Share	$ 10	$ 12		$ 10
Last Sale Price and Dates (3)	$ 54.875	$ 77.75		
Capital	$ 6,214,550	$ 14,754,216	$ 20,968,766	$ 22,608,130
Surplus	15,899,450	45,245,784	61,145,234	62,391,870
Undivided Profits	6,035,274	13,317,361	19,352,635	16,466,635
Res. for Conting.	None	None	None	None
Total	$ 28,149,274	$ 73,317,361	$101,466,635	$101,466,635

	Charter or Buying Bank	Other Bank	Combined	Proposed for Resulting Bank
% of Total	27.74%	72.26%	100%	
Net Adjustments: (Schedule attached)	$ 2,388,101	$ 11,919,124	$ 14,307,225	
Estimated fair value of assets, over and above liability to creditors, contributed by each bank	$ 30,537,375	$ 85,236,485	$115,773,860	
% of Total	26.38%	73.62%	100%	

(1) Excludes Reciprocal Deposits of Correspondent Banks.

(2) Excludes $1,000,000 Inter-Company Accounts.

(3) Mean Prices—11/4/65

* * * * * * * * * *

Proposed allotment of stock:	*Charter or Buying Bank*	*Other Bank*	*Combined*
Number of Shares:	621,455	1,639,358	2,260,813
Aggregate Par Value	$6,214,550	$16,393,580	$22,608,130
% of Total	27.49%	72.51%	100%

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Book Value Per Share	$ 45.30	$ 59.63	$ 44.88
Aggregate Book Value Gain or (Loss)	$ (258,003)	$ 258,003	
Per Share Book Value Gain or (Loss)	$ (.42)	$ .21	

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Fair Value per Share	$ 49.14	$ 69.33	$ 51.21
Aggregate Fair Value Gain or (Loss)	$1,286,683	$(1,286,683)	
Per Share Fair Value Gain or (Loss)	$ 2.07	$ (1.05)	

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Market Value per Share	$ 54.875	$ 77.75	$ 58.3125 Estimated
Aggregate Market Value gain or (Loss)	$2,136,252 Estimated	$ None Estimated	
Market Value per Share gain or (Loss)	$ 3.44 Estimated	$ None Estimated	

SCHEDULE IV.

Schedule showing adjustments to book values in determining the estimated fair value of excess assets, over and above liability to creditors, of each consolidating, merging or selling bank, in support of the proposed allotment of stock of the consolidated bank, receiving association or buying bank to the respective groups of shareholders.

Adjustments	*Charter or Buying Bank*	*Other Bank*	*Combined*
Additions:			
Reserve for Bad Debts -a)	$3 083 057	$ 6 462 054	$ 9 545 111
Other Free Reserves (detail)			
Bond Appreciation -b)		5 457 070	5 457 070
Banking House			
Furn. & Fixtures			
Other Real Estate			
Good Will (indicate basis)			
Total Additions	$3 083 057	$11 919 124	$15 002 181
Deductions:			
Accrued Taxes			
Accrued Interest			
Int. Coll—not earned			
Provision for dividends			
Bond Depreciation -c)	694 956		694 956
Depr. on Bank House			
Depr. on Furn. & Fix.			
Est. Losses—Loans			
Est. Losses—O.R.E.			
Est. Losses—Other			
Total Deductions	694 956		694 956
Net Adjustments	$2 388 101	$11 919 124	$14 307 225
Nonconforming Assets	None	None*	None*

Disposition to be made of nonconforming assets: ____________

(a- After 48% tax
(b- After 25% tax
(c- After 48% tax credit

* Reference is made to letter of Provident Tradesmens Bank and Trust Company dated September 4, 1964, and the reply of the Comptroller of the Currency dated September 8, 1964, requesting and granting, respectively, authorization to Provident National Bank to retain certain equity securities then and now owned by Provident.

SCHEDULE V.

Future Earnings Prospects
(Thousands of Dollars)

The following statements should include actual current operating income and expense for the participating banks for the last full calendar year. The estimate for the Resulting Bank should reflect any anticipated economy in operations or any reduction or increase in income or expense which is expected to result from the proposed transaction.

	Charter or Buying Bank Year 1964	*Other Bank Year 1964*	*1966 Estimate First Twelve Months' Operation of Resulting Bank*
Current operating income:			
Interest and Dividends on Securities	2 335	4 938	7 636
Interest and Discount on Loans	11 807	19 183	36 136
Commissions, fees, and collection, exchange, and service charges	1 638	6 485	9 603
Other current operating income	104	271	415
GROSS CURRENT OPERATING INCOME	15 884	30 877	53 790
Current operating expense:			
Salaries, wages, and fees	4 369	8 690	14 304
Interest on time and saving deposits	3 391	4 747	12 542
Interest and discount on borrowings	79	232	524
Taxes (other than on income)	511	1 201	1 983
Recurring depreciation on banking house, furniture and fixtures	381	409	847
Other current operating expenses	2 940	5 248	8 740
TOTAL CURRENT OPERATING EXPENSE	11 671	20 527	38 940
NET CURRENT OPERATING INCOME	4 213	10 350	14 850

NET OPERATING INCOME PREVIOUS FIVE CALENDAR YEARS

Year	*Charter Bank*	*Merging or Consolidating Bank*
1964	4 213	10 350
1963	4 254	10 004
1962	4 206	9 966
1961	4 190	9 455
1960	4 569	9 520
Average	4 286	9 859

COMPTROLLER OF THE CURRENCY
WASHINGTON, D. C.

Application of

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and

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For Approval to Merge

Economic Brief

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FOR APPROVAL TO MERGE

ECONOMIC BRIEF

INTRODUCTION

This brief is in support of an application for approval to merge Provident National Bank ("Provident") and Central-Penn National Bank ("Central-Penn"), both headquartered in Philadelphia. Provident is the fifth largest Philadelphia bank, with IPC deposits[1] of $471,430,000 and loans (net) of $399,717,000 as of September 30, 1965. Central-Penn is the seventh largest,[2] with IPC deposits of $259,607,000 and loans (net) of $220,440,000 on the same date.

The resulting bank is expected to rank fourth in Philadelphia, following First Pennsylvania Banking and Trust Company, Philadelphia National Bank, and Girard Trust Bank. Its pro-forma combined IPC deposits and loans (net) would have equalled 12.46% and 12.84% respectively of the totals reported for all commercial banks in the Philadelphia Standard Metropolitan Statistical Area as of June 30, 1965, the latest date for which complete figures are available.

Reasons for the Merger

1. The resulting bank, by reason of its greater resources, human as well as financial, will be able to take a more impor-

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1. Deposits of individuals, partnerships and corporations.

2. Continental Bank and Trust Company is here included as a Philadelphia bank, although its head office is in Montgomery County. It was formed in July 1965 through the merger of Montgomery Bank and Trust Company and Broad Street Trust Company, a substantially larger bank which was headquartered in Philadelphia.

tant part in Philadelphia's efforts to revitalize its economy, particularly by attracting and retaining job-creating enterprises and by expanding export and import trade through the Port of Philadelphia, upon which much business and many jobs depend. These efforts lean heavily on the activity and influence of the commercial banks, primarily the larger banks, which also benefit more directly from them.

2. The remarkably complementary branch systems of the two banks, when joined by the merger, will correct the present deficiencies in each system and will provide an area-wide branch system which will be able to compete for personal and small business deposits and other retail banking business upon more equal terms with the existing area-wide systems of five other banks: First Pennsylvania, Philadelphia National, Girard, Fidelity-Philadelphia Trust Company, and Continental Bank and Trust Company.[3]

3. The merger will make available to Central-Penn's present customers and to the local areas served by its neighborhood branches all of the services of Provident, including one of the nation's outstanding trust departments, an aggressive international division, and a more extensive and experienced construction loan department. This will assist in retaining and attracting customers and deposits.

4. Central-Penn is acutely in need of more space for its head office and accounting operations and has been considering a building program, which would be costly and would involve a very substantial long term commitment or investment. Provident has recently renovated its head office and is just completing a new operations building at a total aggregate cost of about eight million dollars. Its renovated head office and new operations building will have adequate space to accommodate the needs of the merged bank, and thus will

3. In Pennsylvania, branching is limited to the headquarters county and contiguous counties. This means that the first four banks named (and also Provident and Central-Penn) are limited in branching to Philadelphia, Bucks, Delaware and Montgomery Counties. Continental, because of its Montgomery County headquarters, can branch into the same four counties *plus* Chester, Berks and Lehigh.

provide a solution for Central-Penn's problems in this respect.

5. Central-Penn needs additional capital and has, in fact, been giving serious consideration to raising such capital by means of a debenture issue or otherwise. On the other hand, Provident is one of the most strongly capitalized banks in the United States.[4] The combined capitalization would be more than adequate for the merged institution.

6. The resulting institution will be in a position to compete more effectively with larger banks in New York and elsewhere for wholesale banking business. For example, it should be able to compete more successfully in the national market for negotiable certificates of deposit, which have become a major, and probably permanent, part of the deposit structure of commercial banking.[5] The larger corporations, which are the principal customers for such certificates, have tended to concentrate their business with larger banks.[6] The same considerations apply to the more recent development of short term note borrowing.

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4. Of the 50 banks throughout the United States covered in the Bank Stock Quarterly of M. A. Schapiro & Co., Inc., Provident had the seventh highest ratio of capital to deposits at June 30, 1965.

5. During the past five years, deposits of Weekly Reporting Member Banks represented by negotiable certificates have increased from a nominal amount to 16.4 billion dollars, or 9.4% of total deposits as of November 10, 1965.

6. The November 1965 issue of the Monthly Review of the Federal Reserve Bank of New York stated: "'The negotiable time certificate has greatly contributed to a broadening of the competition for bank deposits from the local and regional to the nationwide level. Furthermore, the competition for profitable loans and investments has also been broadened, since the C/D market facilitates the search for the needed resources once the lending opportunity arises. The large money market banks have turned out to be strong competitors, particularly because a C/D possesses greater marketability if it is issued by a bank of national repute. This criterion is readily met by the large New York banks, which are therefore able to obtain deposits by issuing C/D's at somewhat lower interest rates than smaller and less well-known banks. The competitive strength of New York 'prime banks' is reflected in the absolute and relative growth of their outstanding C/D's."

7. Earning power of the resulting bank will be greater by reason of improved ability to retain and attract business and by operating economies realizable through better utilization of personnel and office equipment and savings in occupancy expense.

Some further comment on the branch office problem is appropriate:

Central-Penn and Provident are each without branch office representation in certain large and important sections of the metropolitan area. This lack places each of them at a serious competitive disadvantage in the retention and solicitation of retail banking business. The merged bank will have much more complete coverage.

It is well recognized that convenience of banking office location is by far the principal determinant in the choice of a retail banking connection and in the establishment of many business banking relationships. In the Philadelphia metropolitan area, the extraordinary mobility of the residential population[7] and the unusual decentralization of industry and trade make an area-wide system of retail branch offices a competitive necessity.

The importance of a balanced branch system is well illustrated by Provident's high deposit account turnover rate, in which the moving of customers to areas not served by Provident branches is a dominant factor.[8] Provident's vulnerability in this respect is an important contributor to the decline in its share of the total deposits of all Philadelphia Clearing House banks from 12.2% on December 31, 1957 to 10.4% currently (both figures adjusted for mergers). During the same period, Central-Penn's share has also declined, probably for the same reason.

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7. Census figures indicate that a total of 1,300,000 people moved from one place to another within the metropolitan area between 1955 and 1960.

8. In the first ten months of 1965, Provident's ratio of regular and special checking and savings accounts closed during the period to the number of such accounts at the beginning of the period was at an annual rate of 14.5%.

These branch office deficiencies will be remedied by merger of the two branch systems because of their uniquely complementary nature.[9] The establishment of *de novo* branches now would be a long and extremely costly alternative and would result in an overbanked situation in many instances.

Effect on Competition

The merger will extend and intensify—rather than lessen—competition and will not tend to create a monopoly in commercial banking. Any discussion of competition, however, would be unrealistic if it failed to recognize that commercial banks compete not only with other similar banks but with mutual savings banks, savings and loan associations, finance and small loan companies, credit unions, insurance companies and mutual funds . All of these types of competitors are strongly represented in the Philadelphia metropolitan area as set forth in section D of this brief.

Central-Penn and Provident are complementary—rather than competitive—in the retail banking services provided through their neighborhood branch offices, as shown in Exhibits 1 through 4 to this brief. In Delaware County, Provident is rather well represented with five offices, while Central-Penn has but one. On the other hand, Central-Penn has good coverage in lower Bucks County with eight branches widely separated from Provident's two offices in upper Bucks County. In Montgomery County, each bank has two offices, the location of which makes them noncompetitive even though the air distance between the two offices in King of Prussia is relatively short.

Provident and Central-Penn encounter branch office competition, not from each other, but from the largest Philadelphia banks. Every one of Provident's 12 branch offices outside the City of Philadelphia has a branch office of a billion

9. For this reason, bankers not connected with either institution have long suggested that the most logical bank merger in Philadelphia would be Provident and Central-Penn.

dollar bank[10] nearer than the closest branch of Central-Penn. Within the City limits, 18 of Provident's 19 branches have an office of one or more billion dollar banks closer than the nearest Central-Penn branch. The exception is at 12th and Chestnut Streets, across the street from Central-Penn's office at 21 South 12th Street in densely banked center city.

The banks are also complementary—rather than competitive—in many of the services they provide. Provident has one of the larger trust departments in the Philadelphia area; Central-Penn's is quite small by comparison. Provident has a well-established international division; Central-Penn has just entered this field. Provident has developed a more specialized and far reaching construction loan department than Central-Penn. Central-Penn has specialized in local business loans and has built up over the years a strong and experienced commercial loan department. The banks use different computer systems and offer different accounting and data processing services which would provide customers of both banks with a highly versatile package of services.

Not only is present competition between the banks relatively small, but the potentiality of future competition is also small. As pointed out above, the long delay and high cost of *de novo* branching and the overbanked situation that would result in many communities would undoubtedly deter both banks from seeking to develop an area-wide system of offices by that method. Also, considering the expense, personnel and time required to establish a full-scale trust or international department, Central-Penn would be unlikely to become a fully effective competitor in those fields for many years.

From the point of view of customers—as distinguished from competitors—the effects of the merger will be similar to those described by the Federal Reserve Board in its decision approving the merger of two other Philadelphia banks, Fidelity-Philadelphia and Liberty Real Estate Bank and Trust Company.

The effect of the merger on larger customers will be clearly beneficial. The competitive climate in Philadelphia

10. First Pennsylvania, Philadelphia National or Girard.

will be stimulated by the expanded resources and services of a fourth billion dollar bank. The range of choices available to customers who need services which can only or best be rendered by a large bank will be increased.

At the same time, the ten banks with resources of $100 million and over that will remain in the metropolitan area will assure a satisfactory range of choices to the medium size customer who cannot conveniently rely on banks outside the area.

For the small consumer—the jobholder, and homeowner—who is limited in practice to handling affairs in his own locality, the merged bank will provide expanded services, particularly in trusts and estates. There is little or no overlapping in the service areas of Provident and Central-Penn neighborhood branches—and in all cases the offices of other banks provide a wide range of choice.

Provident and Central-Penn do not lack opportunities to put their money to work creatively and profitably. They do need increased deposits to support their lending operations. The merger will put them in a better position to attract deposits in the two currently most productive sources of funds—the retail market and the market for negotiable certificates of deposit.

A. Financial History and Condition

Provident

Provident was incorporated as Provident Trust Company of Philadelphia on February 14, 1922,[11] to take over the banking, trust and other fiduciary business of Provident Life and Trust Company which had been organized on March 22, 1865. For many years the major emphasis of Provident Trust Company was upon fiduciary services, particularly personal trusts. It called itself "America's Pioneer Life Insurance Trustee."

Provident has consistently endeavored to serve customers of moderate means as well as those with substantial

11. It became a National Bank on November 12, 1964.

estates. At September 30, 1965, it had 12,321 personal trust accounts, more than any other bank in Philadelphia. Its total personal trust assets were $2,195,000,000 at market value on the same date.

On April 26, 1957 Provident Trust Company, which then had deposits of $188,455,000 and loans (net) of $101,777,000 merged with Tradesmens Bank and Trust Company, with deposits of $243,195,000 and loans (net) of $134,969,000. This merger, like the proposed merger with Central-Penn, was essentially complementary. Tradesmens had a smaller and less active trust department, but it was well established in the commercial and construction loan fields, and it had one of the oldest foreign departments in Philadelphia. These were areas in which Provident was not competitive or was a relative newcomer.[12]

Prior to the merger with Tradesmens, Provident Trust Company had not been aggressive in the establishment of branches in the three adjacent suburban counties (Delaware, Montgomery and Bucks), into which Philadelphia banks are permitted to branch. Through earlier merger or purchase, it had acquired four offices in Delaware County in 1955 and one office in Montgomery County in 1956. Tradesmens had no branches in the suburban counties.

Two offices in upper Bucks County were acquired by purchase of assets in December, 1957, and another branch in Montgomery County resulted from a 1960 merger. Since 1957 Provident has opened one *de novo* branch in Delaware County, three in Montgomery County, and two in the City of Philadelphia (in addition to the twelve branches already maintained there).

During the past five years, Provident has merged two small banks: December 30, 1960, the Collegeville National Bank with deposits of $4,811,000 and loans (net) of

12. Provident's other mergers and purchases were also noncompetitive in nature, specifically Northern Trust Co., a Philadelphia neighborhood unit bank in 1948, First National Bank of Delaware County in 1955, Ambler Trust Co. in 1956, Merchants National Bank of Quakertown in 1957, Collegeville National Bank in 1960 and Second National Bank of Philadelphia in 1964.

$3,268,000, and on August 17, 1964, Second National Bank of Philadelphia with deposits of $42,196,000 and loans (net) of $24,975,000. Provident's primary reason for both mergers was to obtain retail coverage in areas in which it previously had no branch representation. The Collegeville merger added a modern office at 364 Main Street in that Montgomery County community. The Second National merger added five offices in the northeast section of Philadelphia, specifically, at 4356 Frankford Avenue, 2200 Cottman Avenue, 6705 Rising Sun Avenue, 11830 Bustleton Avenue and 3314 Germantown Avenue.

From the point of view of the Collegeville National Bank the merger solved a critical management and personnel morale problem which had culminated in the resignations of the Bank's two senior active officers. It also enabled the Bank to offer trust services and certain other banking services for the first time.

Second National Bank sought a merger because of its increasing difficulty in meeting demands for expanded banking and trust services; its relatively unsatisfactory earnings performance and unfavorable prospects for improvement; and its inadequate provision for management succession. The merger resulted in the anticipated improvement in service.[13]

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13. The effect of the merger in this regard is described in the following excerpts from a memorandum of Kenneth J. Barber, Senior Vice President and Cashier of the Second National Bank at the time of the merger and now a Vice President of Provident:

"We faced a number of situations in which our customers had grown, and their credit requirements exceeded the legal lending limit of Second National Bank. These customers are in the category of small businesses, but their credit needs exceeded the $300,000 lending limit of Second National Bank.

In addition, several of our accounts have required the financing of new plants, and it was contrary to the policy of Second National Bank to extend mortgage loans secured by a lien on industrial or commercial real estate. We have, therefore, been able to assist several of our accounts in this area, enabling us to meet the competition of both the larger banks, and also the Frankford Trust Company, which specializes in real estate financing.

We have also been able to assist some of our customers in handling their business in export and import trade. Previously this type of transaction was handled through our correspondent, and now we

While certain Second National accounts were lost on the ground that the bank was no longer a local institution, the deposits of the former Second National offices have increased substantially, despite the slightly higher service charges of Provident. The results have been similar at Collegeville.

Central-Penn

The name of Central-Penn National Bank comes from the merger in 1930 of Central National and Penn National Banks. From the beginning, these two old institutions were known primarily as commercial banks and this characteristic has been continued by Central-Penn.

Penn was organized in February 1828 by the merchants and traders living and working in Penn Township and the name of the bank was the Bank of Penn Township until its conversion into a national institution in 1864.

Central National Bank was organized in December 1864 largely in response to the growing needs of industrial firms, including textiles, pipe and tube manufacturers, steel importers and selling agents, producers of steam engines and metal castings, locomotive builders and coal operators.

When these two banks merged in 1930, they complemented each other in creating a unit of larger resources to serve industry, trade and commerce.

Its scope of operation was enlarged in 1950 when it purchased the Charter Bank of Philadelphia, formerly the Morris Plan Bank, an institution of about $6,000,000 in assets specializing in the consumer credit field. Today, Central-Penn's loans in this field exceed $64,000,000.

The extent of Central-Penn's activities in the field of instalment loans to individuals and term loans to smaller

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are able to refer these matters to the International Division, which is more satisfactory, and also builds a closer relationship with our account.

I believe the Trust Division of Provident National Bank is providing a far better, and more complete service to our customers than was available in the past through Second National Bank. Many people of substantial means hesitated to name Second National Bank as executor or trustee under their will, because of the size of the bank. We have been able to secure the appointment of the bank as executor, and trustee in a number of cases involving rather substantial estates."

business units was broadened by the acquisition of five smaller banks in Philadelphia and Bucks County between 1952 and 1958. This acquisition gave Central-Penn sixteen banking offices, including the head office at Broad and Walnut Streets, Philadelphia. It was not until 1958 that Central-Penn acquired its first suburban office. Since that year a total of eight *de novo* branches have been established: two in Montgomery County, three in Lower Bucks County, two in Philadelphia, and one in Delaware County, giving a total of twenty-four offices. Central-Penn has had no mergers or acquisitions in the past five years.

This historical background shows how Central-Penn effectively complements Provident by its strong position in the commercial lending field and in the field of consumer credit.

B. Management

Below is a list of the principal executive officers of the merged bank showing their banking experience and qualifications, their major business or professional occupations, their other banking and business affiliations, their ages, their titles, and the par value of stock to be owned in the resulting bank. Following such list is a list of all the directors of Provident and Central-Penn, showing their principal occupations and the par value of stock to be owned in the resulting bank. Under the Agreement of Merger, Provident is to designate 16 directors for the resulting bank from among its directors, Central-Penn is to designate 9 from among its directors. The persons so designated will be named in the proxy statements of the two banks.

The management of the merged bank will have a combination of broad experience and individual skills at all levels which should enable the merged bank to accomplish more than either bank could accomplish on its own. With the steady trend toward specialized services which characterizes modern banking, larger pools of management personnel are essential. Small organizations, no matter how able, cannot provide the depth of expertise and flexibility that is expected by the managements of dynamic, growing businesses.

PRINCIPAL EXECUTIVE OFFICERS OF THE RESULTING BANK

Name, Title and Present Directorships	*Age*	*Years in Banking*	*Par Value of Stock to be Owned in Resulting Bank*
William G. Foulke Chairman	53	25	$ 3,533.33
Provident National Bank Saving Fund Society of Germantown P. H. Glatfelter Company Bulletin Company—Voting Trustee Alan Wood Steel Company—Voting Trustee East Tenn. & West N. C. Transportation Company and Subsidiaries Pardee & Curtin Lumber Company Blackwood Land Company Calvin Corporation Pardee Company Pardee Land Company Ario Corporation Vanity Fair Mills, Inc. Provident Mutual Life Insurance of Phila. Building Operation Holding Company Provident International Corp. Reliance Insurance Co.			
Harold F. Still, Jr. President	42	19	2,200.00
Central-Penn National Bank The Fidelity Mutual Life Insurance Company			
James M. Large Vice Chairman	61	37	4,933.33
Provident National Bank Fidelity Mutual Life Insurance Co. Commonwealth Land Title Insurance Co. Horn & Hardart Baking Company Horn & Hardart Company of New York South Chester Tube Company South Chester Corporation Chester Tidewater Terminal, Inc. Dodge Steel Company			

Name, Title and Present Directorships	*Age*	*Years in Banking*	*Par Value of Stock to be Owned in Resulting Bank*
Lion Fastener Company, Inc.			
Philadelphia Saving Fund Society			
Pennbrook Milk Company (member of Advisory Bd.)			
Amtek Corporation			
Building Operation Holding Company			
Provident International Corp.			
The Electric Storage Battery Company			
Pennsylvania Ins. Co.			
Benjamin F. Sawin			
Chairman of the Executive Committee	63	45	$ 2,973.33
Provident National Bank			
Alan Wood Steel Company			
Philadelphia Life Insurance Co.			
Commonwealth Land Title Insurance Co.			
Building Operation Holding Company			
Keystone Philadelphia Automobile Club			
Federal Reserve Bank of Philadelphia			
Provident International Corp.			
William B. Carr			
Executive Vice President	49	14	866.67
Provident International Corp.			
Stock Clearing Corporation of Philadelphia			
Financial Executives Institute			
Roger S. Hillas			
Executive Vice President	38	14	1,333.33
Cotiga Development Co.			
E. M. Hanson & Co.			
Soabar Company			
Wm. Penn Charter School (Corp.)			
Huntingdon Industries, Inc.			
Sutro-Wheatley, Inc.			
P. H. Glatfelter Co.			
Frank T. Howard			
Senior Vice President	53	25	533.33
Lawrence J. McEvoy			
Vice President and Cashier	62	33	5,020.00
Independent Manufacturing Co.			

PRESENT DIRECTORS
OF
PROVIDENT NATIONAL BANK

Name	*Principal Occupation*	*Par Value of Stock to be Owned in Resulting Bank*
F. Bruce Baldwin, Jr.	President, Abbotts Dairies	$ 2,306.67
David C. Bevan	Chairman of the Finance Committee The Pennsylvania Railroad Company	1,120.00
Morris Cheston	Ballard, Spahr, Andrews & Ingersoll, Attorneys	1,333.33
Joel Claster	Chairman of the Board Luria Brothers & Co., Inc.	4,000.00
Edward J. Dwyer	President, The Electric Storage Battery Company	1,333.33
William G. Foulke	President	3,533.33
W. R. Gerstnecker	Treasurer, The Pennsylvania Railroad Company	1,133.33
Aaron W. Hardwick	Director, Warner Company	110,600.00
Gordon B. Hattersley	Vice President and Director Sears, Roebuck and Co., Retired	1,120.00
Birkett Howarth	Secretary-Treasurer, Reading Company	1,666.67
James M. Large	Chairman of the Board	4,933.33
M. Albert Linton	Director, Provident Mutual Life Insurance Company of Philadelphia	4,000.00

Name	Principal Occupation	Par Value of Stock to be Owned in Resulting Bank
Allan G. Mitchell	Vice President-Finance and Accounting, Philadelphia Electric Company	1,333.33
William R. K. Mitchell	Director, Provident Mutual Life Insurance Company of Philadelphia	4,133.33
Henry L. Moffett	President, Keystone-Philadelphia Automobile Club	1,120.00
DeLong H. Monahan	Financial Vice President, Provident Mutual Life Insurance Company of Philadelphia	1,333.33
W. E. Mullestein	Vice President and General Manager, Lukens Steel Co.	1,120.00
Thomas L. Prendergast	Vice President and Treasurer, John Wanamaker, Philadelphia	6,306.67
Benjamin F. Sawin	Vice Chairman of the Board and Chairman of the Executive Committee	2,973.33
Claude C. Smith	Duane, Morris & Heckscher, Attorneys	22,066.67
Herbert P. Stellwagen	Director, Insurance Company of North America	1,333.33
J. Tyson Stokes	Morgan, Lewis & Bockius, Attorneys	1,666.67
H. Chandlee Turner, Jr.	Chairman, Turner Construction Company	1,333.33
George D. Widener	Trustee	1,546.67
Howard A. Wolf	Partner, Wolf Brothers	8,053.33

PRESENT DIRECTORS
OF
CENTRAL-PENN NATIONAL BANK

Name	*Principal Occupation*	*Par Value of Stock to be Owned in Resulting Bank*
George E. Bartol, Jr.	Chairman, Hunt Manufacturing Co.	$ 1,560.00
H. Lloyd Beyer	President, Edgcomb Steel Company	1,000.00
J. Frank Cox	Vice President (retired) The Bell Telephone Company of Pennsylvania	2,600.00
Paul R. Dew	Executive Vice President, Abbotts Dairies Division, Fairmont Foods Company	1,000.00
John A. Diemand	Chairman of Executive Committee, Insurance Co. of North America	1,150.00
Joseph L. Eastwick	Chairman, James Lees and Sons Company	3,460.00
Joseph M. First	Vice President and General Counsel, Triangle Publications, Inc.	1,000.00
Samuel B. Fortenbaugh, Jr.	President, Alamo Industries, Inc., Senior Partner, Clark, Ladner, Fortenbaugh & Young	53,527.00

Name	Principal Occupation	Par Value of Stock to be Owned in Resulting Bank
William W. Hagerty	President, Drexel Institute of Technology	$ 1,000.00
John H. W. Ingersoll	Director, Muskogee Company	14,920.00
J. Benton Jones	Vice President, Pennsylvania Railroad Co.	1,160.00
Paul R. Kaiser	President, Tasty Baking Co.	1,740.00
Lloyd E. Long	President, Merchants' Warehouse Company	1,620.00
Charles E. Mather, II	President, Mather & Co.	1,160.00
Earl K. Mueller	Vice Chairman (retired)	2,900.00
H. Merle Mulloy	Vice President and General Counsel, Reading Company	1,000.00
H. Nedwell Ramsey	President (retired), Philadelphia Electric Co.	2,150.00
Harry G. Schad	Vice President, The Atlantic Refining Co.	1,160.00
Casimir A. Sienkiewicz	Chairman	9,220.00
Harold F. Still, Jr.	President	2,200.00
Robert W. Watson	General Manager, Philadelphia Catalog Order Division, Sears, Roebuck and Company	1,000.00
E. Richard Werner	President, Western Saving Fund Society	1,350.00
Charles S. Walton, Jr.	President, Charles S. Walton & Co., Inc.	1,730.00

C. Convenience and Needs of Community

The Philadelphia Standard Metropolitan Statistical Area (SMSA), as defined by the United States Bureau of Census, includes the City of Philadelphia, the Pennsylvania Counties of Bucks, Chester, Delaware and Montgomery, and the New Jersey Counties of Burlington, Camden and Gloucester. Four bridges spanning the Delaware River have accomplished the complete economic, social and cultural integration of the Pennsylvania and New Jersey communities. In the calendar year 1964 over 76¼ million vehicle trips were made across these bridges.

With a population of more than 4.3 million and manufacturing employment exceeding half a million, the area is the fourth largest metropolitan complex in the nation, and is second only to New York on the eastern seaboard. More than 25 million people live within a 100-mile radius of the City of Philadelphia. The Port of Philadelphia, extending from Trenton, New Jersey, on the north to Wilmington, Delaware, on the south, serves 13 states in which one-third of the nation's population lives and works.

Industry

The industrial development of the Philadelphia SMSA area is widely diversified. Nearly 90% of all classes of manufacturing activity recognized by economic statisticians are represented to greater or less degree. No company or industry can be considered dominant. Only two industries, electrical machinery and apparel, account for more than 10% of manufacturing employment. Exhibit 6 to this brief is an article by Bertram W. Zumeta, Economist for the Federal Reserve Bank of Philadelphia describing the industry of the area in more detail.

As shown in Exhibit 6, while the industry of the Philadelphia SMSA is characterized by medium and small companies, it includes many corporations of national stature, presenting needs for the widest possible range of banking

services. There are also the wide range of wholesale and retail establishments and service companies necessary to serve a major metropolitan area. Although slightly more than 40% of the total land area is classified as farm land, farming does not play an important role.

The 1963 Census of Business gives the following statistics for the Philadelphia SMSA:

Manufacturing:	8,125 establishments; payroll, $3,320,-970,000; value added, $5,987,310,000.
Wholesale Trade:	7,476 establishments; payroll, $530,-541,000; sales, $10,252,356,000.
Retail Trade:	39,358 establishments; payroll $666,-822,000; sales, $5,737,442,000.
Selected Services:	22,809 establishments; payroll $321,-010,000; receipts, $1,074,494,000.

Commerce and Transportation

The Philadelphia port ranks second only to New York in total water-borne commerce and is first in foreign commerce. Its importance to the economy of the metropolitan area can hardly be exaggerated. It provides, directly or indirectly, more than 96,000 jobs, and 20% of all manufacturing jobs depend on raw materials received through the port.

The port can accommodate 150 deep-draft vessels at its docks, and a 40-foot deep channel has been dredged up river to the U. S. Steel Fairless plant. Three trunk line railroads run direct to shipside and are interconnected by the Philadelphia Belt Line Railroad. Approximately 350 motor truck lines furnish over-the-road service to all parts of the United States and Canada.

The port has three ore unloading piers with unloading capacity of 5,600 tons per hour; six oil docks with storage capacity of 9,900,000 barrels; two grain elevators with storage capacity of 4¾ million bushels; three coal tipples with

capacity of 37,500 tons per eight-hour day; eighty-one warehouses for general storage with 13½ million square feet of space; and nine cold storage warehouses with nearly 12 million cubic feet of space.

Philadelphia is also a major railroad center. The head offices of the Pennsylvania Railroad and The Reading Company are in the City.

The Philadelphia International Airport is located only 20 minutes by car from center city and is proving to be a point of attraction for new business development.

Philadelphia is also served by a network of superhighways centering on the Pennsylvania and New Jersey Turnpikes, two of the first and most successful ventures of this kind.

Educational, Scientific and Cultural Institutions

Since colonial days, the Philadelphia area has been an important educational, scientific and cultural center. Its 54 colleges and universities include The University of Pennsylvania, Temple University, Haverford College, Swarthmore College, Bryn Mawr College, Drexel Institute of Technology, Villanova University, St. Joseph's College, LaSalle College and Ursinus College, and numerous smaller and more specialized schools such as the Philadelphia Textile Institute and the Curtis Institute of Music.

There are five major medical schools in the City, the medical schools of The University of Pennsylvania and Temple, Jefferson Medical College, Hahnemann Medical College, and Women's Medical College. There are also highly respected scientific institutions such as the Academy of Natural Sciences and the Franklin Institute.

Among the well-known cultural institutions of Philadelphia are the Philadelphia Orchestra, the Philadelphia Museum of Art, the Pennsylvania Academy of Fine Arts, and numerous specialized museums, galleries, libraries and organizations.

Housing

On April 1, 1960, according to the 1960 Census, there were 1,333,821 housing units in the metropolitan area, of which 49% were located in the City of Philadelphia.[14] The Census further disclosed that 64% of the housing units in the seven counties surrounding Philadelphia were single, detached units. Roughly two-thirds of those in the City of Philadelphia were single, attached (row and twin) structures.

Seventy percent of all occupied housing in the metropolitan area was owner-occupied. The median value of the homes in this group was $10,900.

Economic and Social Problems

In the years after World War II, the Philadelphia SMSA lagged behind its urban competitors and the nation as a whole in economic growth. For the period between 1953-64, Philadelphia's employment growth rate was only one-twentieth of the national rate. While the decline in jobs was arrested about 1959 as a result of the renewal efforts discussed below, the number of jobs in the area has grown only one-third as fast as the national rate in the subsequent five-year period. Over this period Philadelphia has been in thirteenth place among the nation's sixteen major cities in terms of employment growth, well behind such other industrial areas as Baltimore, Newark, Chicago, St. Louis and Detroit.[15]

In spite of its natural advantages, the Port of Philadelphia also presents major problems. Foreign exports and imports of general cargo—as distinguished from bulk cargo—have been consistently disappointing over the years. Of

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14. In 1950 the City had 57% of all housing units in the area and in 1940, 61%.

15. An analysis by the Federal Reserve Bank of Philadelphia mentions the following industries which have lagged in contribution to the metropolitan area's employment: trade industries, construction, apparel, electrical equipment, fabricated metals, furniture, leather, lumber and wood, petroleum refining, printing and publishing, rubber and plastics, textiles, tobacco, and ordinance.

the 53 million short tons handled in 1964, only 6 million were in this category. A recent study by the City of Philadelphia and the Chamber of Commerce concluded "... the general cargo being generated by the population of the Philadelphia-Camden area is not moving to any substantial extent across the Philadelphia or Camden waterfronts and Philadelphia is not, in fact, holding its own in terms of general cargo traffic as against the competing ports in the North Atlantic Range."

The problems of the center city are even more serious than those of the metropolitan area as a whole. In the post-war years, Philadelphia has experienced a massive exodus of industry and population to the suburbs. Those who moved out have been replaced largely by unskilled immigrants (mostly Negro) from the rural south. Their lack of training is reflected in high rates of unemployment and an excessive public assistance roll. Under these circumstances, they have not been able to attain an acceptable standard of living. Some 80,000 dwelling units are below the minimum standards of health and decency.

Another factor contributing to the economic problems of the Philadelphia area is the decline in home offices of substantial businesses. Some have moved away. Others have been sold or merged. These have not been replaced. In the vernacular, Philadelphia is in danger of becoming a "branch office town."

Renewal and Revitalization

During the last fifteen years, government officials and private citizens in the City of Philadelphia and its environs have organized efforts on many fronts to rehabilitate the City's facilities and revitalize its economy. As more fully described under "Commercial Banks and Community Needs" below, banks and other financial institutions have a crucial part in these efforts. The merged bank will be able to do more in this field than the two banks could do separately.

In the field of urban renewal and redevelopment, nearly $225,000,000 has been spent by local, state, and federal agen-

cies and an additional $135,000,000 by private developers in a wide variety of projects. Independence National Historical Park has been created out of a large area of blighted buildings in the vicinity of Independence Hall. An additional 28 blocks of slums in the nearby "Society Hill" area have been converted to modern housing. The Eastwick Development in southwest Philadelphia is the nation's largest redevelopment project. A comprehensive redevelopment of Market Street from City Hall to the Delaware River (known as "Market East") is under way.

Philadelphia has also been active in education and science, which are thought to be the indispensable catalyst for urban renewal.[16] Temple University has spent $25,000,000 for new facilities. The University of Pennsylvania has spent $55,000,000 and is well along in a $93,000,000 campaign. Other schools in the area have spent nearly $10,000,000.

Recently, a new community college has gone into operation and a wholly new school board has been appointed to upgrade the public schools.

Plans are far along for a University City Science Center which will bridge the research gap between the universities and industry. The University of Pennsylvania, Drexel and other nearby institutions of learning, research and medicine have organized the University City development to provide attractive housing and surroundings for their students and faculty, and for scientists at the Science Center. These efforts have begun to bear fruit in the form of new research laboratories and research-oriented business moving into the Philadelphia area.

On the business side, the Philadelphia Industrial Development Corporation, a private non-profit corporation embodying a cooperative effort by government and business leaders, has worked with marked success to retard, and in some cases reverse, the outward flow of industry. Other

16. For example, Boston's successful efforts at renewal have been sparked by its great educational and scientific institutions which have attracted a host of research-oriented businesses along Route 128.

agencies in this field are Southeastern Pennsylvania Development Corporation, another private non-profit corporation, and Pennsylvania Industrial Development Authority, a public authority. Numerous industrial parks and similar complexes have sprung up, notably in the King of Prussia and Fort Washington areas.

A more specialized effort is the Food Distribution Center, another public-private cooperative enterprise, which took a long step toward restoring Philadelphia's traditional place in wholesale distribution of meat, seafood, and produce by supplying modern and convenient facilities to replace the antiquated and congested market along Dock Street.

The center city is also being transformed. Five new office buildings have been built in Penn Center, the site of the former Pennsylvania Railroad Broad Street station and tracks. Redevelopment has spread outward from Penn Center with a new hotel, a motor inn, four apartment complexes, a municipal services building, a large underground parking facility, and a building for Continental Bank and Trust Company, still in the earliest stage of construction. Plans are nearing completion for a new $25,000,000 stadium in South Philadelphia.

Steps are also being taken to deal with the problems of the port. The Delaware River Port Authority (organized in 1931 to improve the port area and interstate transportation) has announced plans for a new high-speed line to link the New Jersey and Pennsylvania portions of the area even more closely. A non-profit Port Development Corporation, modeled generally after the Philadelphia Industrial Development Corporation and the Food Distribution Center, has recently been established to renovate and replace cargo handling facilities, and a $25,000,000 loan has been authorized for this purpose.

In mass transportation, Philadelphia pioneered in promoting improved commuter rail service through the Passenger Service Improvement Corporation (PSIC), a City agency, and Southeastern Pennsylvania Transportation

Compact (SEPACT), a cooperative arrangement by four counties, Philadelphia, Bucks, Montgomery and Chester. These measures resulted in increased rail ridership and revenues to lessen passenger deficits of the Reading Company and the Pennsylvania Railroad.

A more formal and comprehensive approach to the regional problem of mass transportation was undertaken by the Pennsylvania Legislature when it created the Southeastern Pennsylvania Transportation Authority (SEPTA) under its "Mass Transportation Act of 1963." This Authority embraced five counties—Philadelphia, Bucks, Montgomery, Chester and Delaware—and was set up for the express purpose of achieving an integrated system of mass transportation within this region. To this end, SEPTA was granted the power and authority to acquire "by purchase, condemnation, lease, gift or otherwise" passenger transportation facilities in the five-county area. The problem of adequate, unified, efficient and economical transportation is very acute and any attempt to solve it will involve large financing, public and private, in which the merged bank will play its part along with other local banks.

In the field of housing, a massive plan is being developed to replace below standard housing facilities in the City of Philadelphia. Preliminary estimates of costs run as high as $1,000,000,000 over a 10-year period. The task of financing this project obviously will require the coordinated efforts of many types of lenders as well as the taxing authorities.

In human renewal, after a relatively slow start, Philadelphia is developing an acceptable organization under the Economic Opportunities Act. The organization which has evolved is a sound one, with widespread support in the community. Philadelphia appears on the threshold of substantial accomplishment in this field.

Commercial Banks and Community Needs

It would be difficult to overstate the importance of a sound, aggressive, resourceful and adequate system of com-

mercial banks to the economic health of any metropolitan area. The tremendous size and diversity of the Philadelphia SMSA, the massive shifts of population, industry and business which have characterized it, and the pressing economic and social problems described above have made great demands upon the area's commercial banks. By the same token, they have presented the banks with many opportunities for service to the community and profit to themselves.

In their efforts to rehabilitate Philadelphia's economy, City officials and business leaders have relied on the commercial banks. The larger banks, especially—by reason of their influence in the financial and business communities and the scope and diversity of their services—have been called on to play a major role. They have greater numbers of skilled personnel to handle the new projects developed by the planners; and they have more resources—more "margin for error"—to accept the risks involved in implementing these projects.[17]

Unfortunately, Philadelphia commercial banks, as a group, are smaller than the financial business of the metropolitan area would warrant. They have not been able, in all cases, to take the part that the City officials and business leaders would have liked.

The Philadelphia Port is a dramatic illustration of how the problems of Philadelphia overtax the resources of its banks. Efforts to expand exports and general cargo commerce have been handicapped by the limited international banking resources in Philadelphia. The business has gone to other ports where financing is more readily available. John H. Frazier, Director of Port Development has stated:

> "New York financing for international trade helps make the Port of New York the biggest General Cargo Port in the Nation. *Additional international banking*

17. For example, SEPTA is proposing one or more multi-million dollar revenue bond issues to finance acquisition of privately-owned transportation facilities. Undoubtedly the banks will be called upon to provide interim financing in very large amounts.

resources in Philadelphia will assist in creating a more competitive position. Cargo financed in Philadelphia should move through Philadelphia's Port." (emphasis supplied)[18]

Another area where larger banks have a special part to play is the effort to halt the exodus of business away from Philadelphia. As noted above, a substantial number of Philadelphia businesses have been sold to interests with headquarters located outside the area, and the headquarters offices so lost have not been fully replaced. Adequacy or inadequacy of local commercial banking resources is an influential factor in such moves and also in determining whether the local banks continue as major depositories or lose all but a payroll or office account.

In the competition to retain and attract prestige business accounts, which in turn will spur the general economy of the area, Philadelphia banks are at a disadvantage because they have smaller lending limits than the leading banks in New York, Pittsburgh and other cities. While theoretically a joint effort by a group of banks can overcome the inadequacy of the resources of any one of them, experience proves that in most cases the customer prefers to resort to a larger bank. This may ultimately mean the loss of headquarters business by Philadelphia. It inevitably means the loss of large, prestige accounts by the Philadelphia banks.[19]

While harder to demonstrate, there is also a similar trend among smaller businesses which are growing, changing, and developing new financial problems. These energetic,

18. The 1965 New York Port Handbook states that "over 70% of the international commerce of the United States is financed by New York banks."

19. While the Philadelphia banks are anxious to attract more national prestige accounts for themselves and the City, they do not neglect smaller customers and the general public. If there has been any preoccupation, it has been in the opposite direction as evidenced by their heavy commitment to retail banking. For example, 80% of Central-Penn's advertising budget of $211,000 and 70% of Provident's budget of $350,000 for the year 1965 were devoted to the retail market.

dynamic concerns, the kind that could do much for the Philadelphia business community, are often attracted to New York banks instead of Philadelphia banks by reason of the highly specialized services and personnel the New York banks are able to offer—again because of their larger size.

In sum, it can be said that Philadelphia desperately needs stronger commercial banks if it is to succeed in its economic, community and human renewal. The merger of Provident and Central-Penn is a small, but significant, step in that direction.

D. Effect on Competition

1. Competition Between Provident and Central-Penn

Retail Banking

Retail banking—i.e., personal and small business checking and savings accounts and loans—is probably the most intense area of competition in banking today. Commercial banks can no longer heavily rely for their working funds and earnings on large and steady corporate demand balances. Attractive short term money rates have induced alert corporation treasurers to reduce demand balances to a minimum and to invest the excess. More and more the banks must rely upon the deposits (including savings deposits) of individuals and small businessmen. In competition for this business, interest rates and quality of services are important, but they tend to level out, since no bank can long afford to pay more or offer less than its competitors. Thus, in the last analysis, and this is proven by every market survey, the retail customer's choice of a bank is largely influenced by convenience—the distance from his home to the bank office and the parking and other facilities available when he gets there.

As shown in the introduction to this brief and on the maps attached as Exhibits 1 and 2, the merger will not lessen competition in retail banking between Provident and Central-

Penn because there is virtually no duplication of branch office locations.

Moreover, the combination of Provident and Central-Penn branches will not give the resulting bank an advantage over other Philadelphia commercial banks. The resulting system of branches will be no more effective than the existing area-wide branch systems of First Pennsylvania, Girard, Fidelity-Philadelphia, Philadelphia National and Continental. There will still be significant gaps in the merged bank's coverage of the Main Line, Norristown and Old York Road sections—all areas where other banks are better represented.

Wholesale Banking

In the wholesale banking field, Provident and Central-Penn have both encountered far more competition from other commercial banks within and without the Philadelphia SMSA than they have from each other. This has been due in part to the complementary characteristics of the banking and trust services rendered, and particularly to the differing emphases on categories of new business activity.

In the field of wholesale banking, all Philadelphia commercial banks operate in the shadow of New York. Each of the two largest banks in New York has total assets more than twice the combined total assets of the ten largest Philadelphia banks. The seventh largest bank in New York has greater assets than the largest Philadelphia bank. New York is only an hour and a half from Philadelphia by train, about two hours by car. New York banks call regularly on the larger firms in Philadelphia, and the financial officer of any Philadelphia firm knows that if he is dissatisfied with the terms he is offered in this City, he has only to pick up the phone to tap the world's largest money market.[20]

20. The larger corporations in York, Reading, Bethlehem, and other cities of eastern Pennsylvania tend to patronize New York banks because of their greater size and prestige, despite the fact that these cities are closer to Philadelphia. The same is true of the national corporations near Wilmington, Delaware, which by-pass Philadelphia to patronize New York banks.

Additional outside competition is encountered from the larger Pittsburgh banks, particularly the Mellon National Bank and Trust Co. and the Pittsburgh National Bank. The Mellon bank is substantially larger than the largest Philadelphia banks. Like the New York banks, the Pittsburgh banks regularly send representatives to solicit business in Philadelphia.

Thus, wholesale customers of the two banks are under constant aggressive solicitation by a host of other banks desiring a share of their business. In wholesale banking, convenience of office location is a secondary consideration because of the extensive use of the mails, including lock boxes, for deposits. Indeed, such use usually expedites item collection and reduces float by reason of around-the-clock mail pickup and check processing. This means that banks headquartered in other cities are not at a competitive disadvantage in seeking wholesale business in the Philadelphia area.

Mutual Customers

The fact that competition between Central-Penn and Provident has been minimal has been borne out by analyses of lists of various types of depositors to determine the extent of duplications. Comments on the several analyses of accounts with mutual customers (i.e., customers doing business with both banks) follow:

Savings Accounts. On September 30, 1965, Central-Penn had 54,127 savings accounts totalling $65,285,000, and Provident had 67,601 totalling $95,557,000. Out of the combined total of 3,277 savings accounts with balances of $10,000 or more, there were only 28 mutual customers as follows:

	Saving Fund Accounts			
	Central-Penn		*Provident*	
	No. of Accts.	*Total Balances*	*No. of Accts.*	*Total Balances*
Accounts over $20,000	1	$101,000	10	$448,000
Accounts $10,000 to $20,000	27	334,000	18	197,000
		$435,000		$645,000

Both banks presently pay 4% interest on savings accounts, as do the other principal commercial banks. The four mutual savings banks, with more than 50 branch offices in the metropolitan area, currently pay 4¼% interest.

Savings Certificates. There were nine mutual holders of the new 4½% savings certificates, consisting of two non-profit organizations holding $160,000 of each bank's certificates, and seven individuals holding $70,000 of Provident's certificates and $98,100 of Central-Penn's.

Certificates of Deposit. Certificates of Deposit issued by both banks to mutual depositors were as follows:

	Certificates of Deposit	
	Central-Penn	*Provident*
2 Political subdivisions	$ 7,500,000	$6,500,000
2 National corporations	1,178,750	600,000
2 Large local corporations	1,500,000	1,900,000
2 Large local savings and loan associations	150,000	500,000
	$10,328,750	$9,500,000

All of these funds are managed by competent administrators who have nearly unlimited competitive choices available within and without the metropolitan area.

Open Time Deposits. Four mutual customers had open time deposit balances in each bank in excess of $10,000 as follows:

	Open Time Deposits	
	Central-Penn	*Provident*
Medium sized local corporation	$ 66,000	$ 50,000
Large local non-profit organization	1,435,000	544,000
Major public authority	250,000	246,000
Major insurance company	722,000	824,000
	$2,473,000	$1,664,000

Here, again, the financial officers administering these accounts are under solicitation by many competitors for these deposits.

Regular Checking Accounts. Provident presently has about 59,600 regular checking accounts, and Central-Penn has over 29,100. A comparison of all regular checking accounts having balances of $10,000 or more in each bank disclosed 139 mutual accounts, classified as follows:[21]

No. of Depositors		*Central-Penn*	*Provident*
47	National corporations	$14,588,000	$31,497,000
42	Local but large corps. or firms	4,514,000	8,357,000
2	Wealthy individuals	258,000	450,000
11	Large non-profit corporations	602,000	1,392,000
6	Medium size corporations	137,000	187,000
18	Securities brokers and dealers	577,000	2,416,000
3	Other indivduals	92,000	38,000
5	States and political subdivisions	3,027,000	7,088,000
5	Savings and loan associations	219,000	374,000
139		$24,014,000	$51,799,000

The largest category by number of accounts and by dollar volume is national corporations—whose business is actively solicited not only by other Philadelphia banks but by New York banks and others across the country. Many have their headquarters outside metropolitan Philadelphia and some have no office in the area. These are frequently the hardest accounts to obtain and to retain in the face of the intense competitive activity.

The local but large corporations or firms are also subject to very competitive solicitation by both Philadelphia, New York and other banks.

The large non-profit corporations, such as major religious and charitable organizations, will not want for alternative banking choices after the merger in view of the knowledge, experience and contacts of their officers and trustees and the many banks available in the area.

21. While the tabulation includes duplicate accounts with balances of $10,000 or more, it is at once obvious from the average balance per account ($373,000 for Provident and $173,000 for Central-Penn) that most of the balances represented are far in excess of $10,000. The median for Provident was a $75,000 balance and the median for Central-Penn was $50,000.

Medium sized corporations may not be subject to as much solicitation by out-of-town banks as the larger corporations, but by the same token there are many Philadelphia area banks in a position to meet their needs. After the merger, their competitive choices, while reduced by one, will still be more than ample.

Deposits of securities brokers and dealers are usually placed with banks primarily as consideration for the allocation of securities business from bank portfolios, trust departments and customers' securities departments. The balances in such accounts are generally proportional to the amount of business received. Thus, the duplicate accounts in this group do not represent any real competition between Provident and Central-Penn which would be eliminated by the merger.

Wealthy individuals are influenced in the selection of depositories by convenience and by such factors as acquaintance with bank officers, corporate banking and personal trust relationships, attractiveness of facilities and the services rendered by particular individuals within a bank. The duplicate accounts in this group are attributable to considerations of this kind rather than competition between the banks.

Public funds deposits, while usually required in Pennsylvania to be secured by pledge of bonds, represent a highly competitive field with banks acting in some cases as township or school district treasurer for a nominal fee in order to protect balances. The forthcoming consolidation of school districts in Pennsylvania and the resulting reduction in the number of such depositors has already intensified competition for the declining number of accounts.

Correspondent Banks. Domestic correspondent bank business is probably the most competitive category of wholesale banking. Mutual correspondent bank customers of Central-Penn and Provident and current balances are as follows:

No. of Accts.		*Central-Penn*	*Provident*
4	Philadelphia mutual savings banks	$4,445,000	$6,905,000
8	Four county area (excl. Phila. mutual savings banks)	4,443,000	2,067,000
8	Other Pennsylvania	620,000	1,421,000
13	Outside Pennsylvania	902,000	1,982,000
33		$10,410,000*	$12,375,000*

* Includes balances of correspondent banks with which Central-Penn and/or Provident maintains reciprocal accounts	$ 4,856,000	$ 3,040,000

There can be no doubt that the competitive choices remaining available to the present mutual correspondent bank customers tabulated above will be more than adequate after the merger.

Five foreign banks are depositors of both banks, current balances being as follows:

No. of Accts.	*Central-Penn*	*Provident*
5	$ 318,000*	$ 559,000*
* Includes reciprocal balances (see above)	$ 151,000	$ 210,000

Principal competitors for this type of business are the largest banks in New York, Chicago, San Francisco, Philadelphia, Boston and other international financial centers.

Loans. Provident's and Central-Penn's loans (gross) totalled $412,144,000 and $226,369,000, respectively, on September 30, 1965. Loan balances of $10,000 or more for each bank were compared, disclosing 32 mutual borrowers to whom Central-Penn's loans totalled $12,483,000 and Provident's totalled $20,454,000. These mutual loans are summarized below:

Loans of $1,000,000 or more at either bank	*Amount of Loan*	
	Central-Penn	*Provident*
A.	$1,000,000	$ 1,500,000
B.	2,425,000	65,000
C.	1,214,000	4,085,000
D.	900,000	3,681,000
E.	900,000	1,500,000
F.	929,000	2,207,000
G.	300,000	1,500,000
H.	845,000	3,309,000
	$8,513,000	$17,847,000
Loans of less than $1,000,000		
25 loans (see below)	3,970,000	2,607,000
	$12,483,000	$20,454,000

Comments on mutual borrowers of $1,000,000 and more:

Borrower A. This finance company has lines of credit totalling $24,850,000 from 62 banks.

Borrower B. Because of legal lending limit[22] on loans to a parent and subsidiary companies, Provident sold the amount in excess of its overall limit to several banks including Central-Penn.

Borrower C. Loans in excess of Provident's legal lending limit were participated to Central-Penn and one other bank. $223,00 of Central-Penn's loan to Borrower C is through the third bank which is agent for a portion of the aggregate borrowings.

Borrower D. This credit is shared by two other Philadelphia banks and by one New York City bank, at the request of the borrower.

Borrower E. Central-Penn and Provident share these loans with a third Philadelphia bank which is agent.

Borrower F. Participations in loans to this borrower and mutual customer were purchased by Provident from one New York City bank and by Central-Penn from two New York City banks.

Borrower G. A finance company, has lines of credit from 74 banks totalling $23,575,000.

Borrower H. Central-Penn and Provident participate with approximately eleven banks in this credit for which a New York bank is agent.

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22. The present lending limits are $2,500,000 for Central-Penn and $7,000,000 for Provident. The lending limit for the merged bank will be $10,000,000.

The mutual loans of less than $1,000,000 fall into the following categories:

Types of Loans	*Amount of Loan* Central-Penn	*Amount of Loan* Provident
Secured largely by marketable collateral:		
1 Corporation	$ 77,000	$ 70,000
10 Individuals	974,000	419,000
Secured by other collateral:		
3 Corporations*	1,373,000	954,000
2 Individuals	25,000	27,000
Unsecured:		
8 Corporations*	1,511,000	1,092,000
1 Individual	10,000	45,000
	$3,970,000	$2,607,000

* Banks other than Central-Penn and Provident participate in these credits.

The foregoing comments and classification show that the merger will pose no problem for the large corporate borrowers. All enjoy high credit standing and have multiple commercial banking alternatives available to them. They also show that there was an insignificant number of mutual loans to individuals or small businesses. The ten individual mutual customers who borrow from both banks on marketable collateral would have no difficulty making other borrowing arrangements should they choose to do so.

A comparison of lists of consumer credit customers of the two banks would have presented a monumental problem and was not attempted. It is doubtful that more than an insignificant overlap is involved, not only because of the complementary branch systems, but also because of differences in the sources of dealer paper, which comprises $64,000,000, or about 65%, of Provident's outstandings. Of such dealer paper, about 80% originates outside the Philadelphia SMSA, largely in Ohio, Kentucky, West Virginia, Maryland and Virginia. While Central-Penn is also active in dealer origi-

nated consumer financing, nearly all is purchased in the metropolitan area.

General Comment. In the foregoing discussion of the present customer relationships shared by Central-Penn and Provident, emphasis has been placed upon the fact that the merger would not deprive any customer of the opportunity to continue to do business with more than one bank and with a minimum of inconvenience. This does not mean, however, that the resulting bank will not seek to retain these customers. In fact, it will make every effort to reduce customer attrition to a minimum by strict attention to the maintenance of the same high quality and highly personalized service for which both banks have been well known over the years. These efforts will be aided by the availability of expanded banking and trust services at many of the branch locations.

2. Competition With Others

Commercial banks compete not only with each other but with many other types of savings and financing institutions and agencies. Such competition has become more intensive with the passing years. Since 1961, particularly, the competitive tempo has further increased as the commercial banks have had to rely more and more on interest-bearing accounts and certificates of deposit and as they have brought all of the modern marketing techniques into play.

(a) *Commercial Banks*

Much has already been stated about the current competition between commercial banks. The following discussion is concerned primarily with competition with banks and for business outside the Philadelphia SMSA, and also with the matter of concentration of commercial banking resources.

Indicative of some of the competition with banks outside the metropolitan area are the following statistics:

	Central-Penn		Provident	
*Confirmed Commercial Lines of Credit**	*No. of Customers*	*Totals*	*No. of Customers*	*Totals*
Customers also having lines from banks outside metropolitan area**	46	$52,550,000	149	$232,215,000
All others	32	38,757,000	192	110,887,000
	78	$91,307,000	341	$343,102,000
** % of total	59.0%	57.6%	43.7%	67.7%

* Formal lines of credit confirmed to the customer, as distinguished from lending officers' discretionary guidance lines.

*Correspondent Bank Customers**				
Banks outside Philadelphia and the three contiguous counties	87	$13,703,000	260	$43,385,000
All others	15	8,694,000	25	10,924,000
	102	$22,397,000	285	$54,309,000

* On June 30, 1965, Provident and Central-Penn together held 11.8% of the correspondent bank deposit balances of the six largest Philadelphia banks. Balances of the two largest banks, First Pennsylvania and Philadelphia National. aggregated 68.3% of the total.

*Demand Deposit Accounts which are assigned to officers for follow-up, excl. correspondent banks**				
Accts. controlled from outside Philadelphia SMSA**	137	$29,919,000	553	$41,416,000
All others	1,897	89,451,000	5,044	156,933,000
	2,034	$111,370,000	5,597	$198,349,000
** % of total	6.7%	19.7%	9.9%	20.9%

* The executive offices of many and the operations of some of these corporate customers are located in New York City.

Fiduciary Services. In the corporate fiduciary field as well, neither the boundaries of the metropolitan area nor those of the four-county branch banking area protect Philadelphia banks from outside bank competition or restrict the opportunities of Philadelphia banks to secure outside business. Moreover, in this important field of estates, trusts, investment agency, advisory and custodian accounts, banks encounter intense competition not only from each other but from lawyers, securities brokers, investment counsel, mutual funds, insurance companies, and from non-professional individuals. By way of illustration, in the 7426 wills probated in Philadelphia, Bucks, Delaware and Montgomery Counties in the year 1964, involving assets estimated at a total of nearly \$156 million, corporate fiduciaries reportedly were appointed and qualified as to 661 estates aggregating \$39.5 million or 25.3% of the total.

Bank Concentration. The actual scope and intensity of competition with and among banks for commercial banking, trust and the newer data processing and other accounting services rendered by the banks tend to diminish the theoretical significance of bank asset concentration ratios, so long as adequate competitive bank choices remain conveniently available. Nevertheless, even by the bank asset concentration ratio test, it is evident that the banking scene in the Philadelphia metropolitan area is dominated less by its largest banks than is the case in all but one important financial center of the United States. Attention was called to this situation by the Federal Reserve Board in its statement in the case of Fidelity-Philadelphia's merger with Liberty Real Estate. The Board referred to a 1959 Congressional finding reported in S. Rep. No. 196, p. 27, 86th Cong. 1st sess. 1959. The finding of the Congressional study was as follows (the listing sequence of the centers has been rearranged in the order of concentration rank):

PERCENTAGE OF TOTAL ASSETS OWNED BY LARGEST BANKS IN PRINCIPAL FINANCIAL CENTERS OUTSIDE NEW YORK CITY

Rank	Four Largest Banks		Two Largest Banks		Largest Bank	
1.	Providence	98%	Providence	93.3%	Cleveland	74.7%
2.	Cleveland	97	Pittsburgh	79.2	Pittsburgh	61.0
3.	Atlanta	92	Minneapolis	76.0	Providence	57.7
4.	Detroit	90	Cleveland	72.3	Boston	52.2
5.	Pittsburgh	87	Boston	71.6	Detroit	46.5
6.	Minneapolis	87	Chicago	66.9	Minneapolis	39.7
7.	Chicago	84	Detroit	65.9	Kansas City	34.3
8.	Dallas	84	Dallas	64.9	Chicago	34.1
9.	Richmond	84	Atlanta	63.9	Atlanta	33.2
10.	Boston	83	Richmond	55.9	Richmond	33.2
11.	Baltimore	77	Kansas City	53.7	Dallas	32.8
12.	Kansas City	75	St. Louis	53.5	St. Louis	28.0
13.	PHILADELPHIA	69	Baltimore	44.9	Washington	26.3
14.	St. Louis	68	PHILADELPHIA	44.6	PHILADELPHIA	24.7
15.	Washington	60	Washington	43.0	Baltimore	24.0

The corresponding percentages for New York City are:

—	New York	60	New York	41.6	New York	22.0

It will be noted that Philadelphia ranked 13th among the 15 principal financial centers as to the percentage of assets owned by the four largest banks, and ranked 14th as to the percentage held by the two largest and the largest banks. There has been no significant change in Philadelphia's concentration ratio since 1959, although in the interim the metropolitan area has been redefined as the Philadelphia Standard Metropolitan Statistical Area. There will be no significant change as a result of the merger.

On June 30, 1965, the latest date for which complete figures are available, the four largest banks in the SMSA held the following percentages of IPC deposits and loans (net):

		Percentage Held	
Rank	*Bank*	*IPC Deposits*	*Loans (net)*
1	First Pennsylvania	16.28%	19.50%
2	Philadelphia National	14.79	15.46
3	Girard Trust	12.97	13.25
4	Fidelity-Philadelphia	10.62	10.13
	Four largest	54.66%	58.34%

On June 30, 1965, Provident and Central-Penn together held 12.46% of total IPC deposits and 12.84% of total loans (net) in the SMSA. Replacement of Fidelity-Philadelphia by the merged bank in the table above would raise the percentages held by the four largest banks only to 56.50% in the case of IPC deposits and to 61.05% in the case of loans (net).

In the matter of personal trust assets, the resulting bank would continue to rank fourth among the Philadelphia banks, even though it is believed that it would hold the largest number of individual accounts. This reflects the above-average proportion of smaller trusts being administered by Provident and Central-Penn.

(b) *Mutual Savings Banks*

(c) *Savings and Loan Associations*

The four mutual savings banks with head offices in Philadelphia are well managed institutions with records of sound

operation for from 111 to 149 years. One, the Philadelphia Saving Fund Society, is the largest bank in eastern Pennsylvania. The four savings banks have more than 50 branches in the metropolitan area. Through highly promotional radio and television announcements and display advertising, the public is constantly reminded that "mutuals" pay 4¼% interest on regular savings accounts (¼% more than commercial banks are permitted to pay in Pennsylvania). This competitive advantage has contributed much to their higher rate of growth than that recorded in savings deposits of the commercial banks.

The insured savings and loan associations have competed successfully for personal savings and have also solicited corporation funds. Promotion has emphasized the "savings" function, the higher dividend rate (until the mutual savings banks also decided to pay 4¼%), "Federal" insurance, and frequently, valuable premiums on new accounts. The success with which they have competed with mutual savings and large commercial banks for savings and mortgage loans is indicated in Exhibit 5. There is no area in the City where the commercial banks are not in direct competition with a nearby office of a savings and loan association.

Moreover, many out-of-state (principally California) savings and loan associations advertise and use direct mail extensively in solicitation of mail deposits, emphasizing the higher interest rates offered. First Pennsylvania cited the drain of deposits resulting from such out-of-state competition as a principal reason for its recent decision to offer five year 4½% savings bonds, now also offered by most other Philadelphia banks.

It will be noted in Exhibit 5 that savings deposits and mortgage loans of the eight largest Philadelphia commercial banks amounted in the aggregate to only 16.94% and 6.99%, respectively, of the combined totals for such banks, the four mutual savings banks and the insured savings and loan associations in the area as of December 31, 1964. On the same basis, the merged bank would have held 2.90% of savings deposits and 0.77% of mortgage loans.

(d) *Life Insurance Companies*

The Philadelphia telephone directory lists more than 300 insurance companies with offices in the City. The following tabulation shows total admitted assets, mortgage loans and policy loans of the larger companies with headquarters in Philadelphia as of December 31, 1964:

Companies	*Admitted Assets*	*Mortgage Loans*	*Policy Loans*
Fidelity Mutual Life	$ 442,770,000	$ 146,061,000	$ 30,216,000
Home Life	95,338,000	45,612,000	3,039,000
Life Ins. Co. of N. Amer.	44,716,000	7,660,000	1,354,000
Penn Mutual Life	2,068,973,000	625,256,000	140,358,000
Philadelphia Life	109,355,000	36,822,000	6,646,000
Presbyterian Ministers' Fund	95,760,000	19,098,000	6,428,000
Provident Mutual Life	989,936,000	328,387,000	58,626,000
Total	$3,846,848,000	$1,208,896,000	$246,667,000

The three largest companies have been very active in private placement financing, and they are joined in competition for local financing by all of the leading national life insurance companies, and many Canadian companies as well. All of these and many smaller companies actively solicit real estate mortgages—residential, commercial, and industrial—for investment. Some companies maintain their own mortgage offices in Philadelphia while others rely upon local mortgage service companies for their supply.

(e) *Credit Unions*

There are reported to be 285 credit unions in the Philadelphia area. The volume of savings invested in and loans granted by all credit unions in the SMSA is not known, but 1,273 Pennsylvania credit unions were reported to have total assets of $365.9 million and total loans of $244.9 million as of December 31, 1964. Credit unions make the most of their competitive position, emphasizing mutual ownership, low loan interest rates, in some cases the payroll deduction method of loan repayment and savings, and convenience of access to credit union facilities.

(f) *Sales Finance Companies and Personal Loan Companies*

There are understood to be about 100 sales finance companies and about 300 small loan and consumer discount companies operating within the service area of the merged bank. Many of these companies have large branch office systems. The Philadelphia telephone directory indicates that Beneficial Finance Companies have 14 offices, Household Finance Corporations have 26 offices, and Ritter Finance Companies have 18 offices. All of these companies compete very aggressively with the commercial banks for automobile, home modernization, and personal loan financing.

(g) *Factors*

There are 15 factoring companies with offices in the City of Philadelphia.

(h) *Direct Lending Agencies of Government*

Such agencies are not regarded as competitive with commercial banks in the metropolitan area, with the exception of limited activity on the part of farm credit agencies in the rural sections of the contiguous counties.

3. Growth of Competing Institutions

The November Bulletin of the Pennsylvania Bankers Association reported comparative asset growth of banks, savings and loan associations and credit unions for the period 1959-1964 as follows: (in thousands)

	1964	*1959*	*% Increase*
Banks	$24,200,000	$17,700,000	36.7%
Savings and loan associations	5,600,000	3,500,000	60.0
Credit unions	365,900	216,500	69.0

It will be noted that savings and loan associations and credit unions both registered greater percentage increases than banks.

4. Loan Participations—Year 1964

Central-Penn. Participations of $391,000 in loans totalling $802,000 were placed primarily with correspondent banks to assist in their investment programs. Two other participations totalling $41,000 in loans totalling $71,000 were placed with other banks at the request of the borrowers. No loans were participated because they exceeded Central-Penn's legal lending limit.

Provident. In four loans totalling $30,142,000, 31 participations aggregating $15,652,000 were placed with other banks because the loans exceeded Provident's legal lending limit. In thirteen loans totalling $53,638,000, 34 participations totalling $35,920,000 were placed with other banks at the request of the borrowers. Out of 51 loans totalling $33,427,000, 249 participations aggregating $11,427,000 were placed with correspondent banks to assist them in investing surplus funds.

5. Financial Factors

The complementarity of the merger insofar as capital is concerned is reflected in the ratio of deposits to capital for the two banks. Provident's ratio is about 8.1, the second lowest among major Philadelphia banks. Central-Penn's ratio is about 11.3, the highest. The average is about 9.3.

The fact that both banks need the added growth and earnings potential which will be afforded by the merger is shown by their ratios of stock prices to book value, 121.1% for Central-Penn and 130.4% Provident, the lowest and next-to-lowest among major Philadelphia banks. The average is about 140%.

The fact that the merger will strengthen Central-Penn is obvious. The fact that Provident is not obtaining a pre-eminent position by the merger is reflected in the absence of any "premium." The exchange ratio is based directly on earnings, adjusted book values, and deposit loan size and growth factors.

— End —

Notes as to Supplementary Material Supplied to Comptroller

Note A: The Application as filed with the Comptroller of the Currency contained the following material not printed in this Appendix:

1. Maps showing the locations of all banking offices in Philadelphia, Bucks, Delaware and Montgomery Counties, Pennsylvania and in the City of Camden, New Jersey.

2. Information regarding Demand and Time and Savings "I.P.C." Deposits for each bank located in Philadelphia, Bucks, Delaware, Montgomery and Chester Counties, Pennsylvania, and in Burlington, Gloucester and Camden Counties, New Jersey.

3. Location of branch offices of all banks headquartered in Philadelphia, Bucks, Delaware and Montgomery Counties, Pennsylvania and in the City of Camden, New Jersey.

4. Information regarding Withdrawable Balances and Loans of Mutual Savings Banks, Savings and Loan Associations and the six Largest Commercial Banks in the Service Areas of Provident National Bank and Central-Penn National Bank.

5. Information regarding the economy of Philadelphia.

All of the above material is contained in the typewritten record as Exhibit "A" to the motion of defendant banks for final judgment.

Note B: Subsequent to the filing of the application with the Comptroller of the Currency the banks submitted to the Comptroller the following additional material:

1. Material on bank branches in Camden, Burlington and Gloucester Counties, New Jersey.

2. Information regarding waterborne commerce to and from the Port of Philadelphia.

3. Information regarding corporations headquartered in the Philadelphia area.

4. Maps showing primary service areas of Provident and Central-Penn branches and the banks' comments on statements made in Federal Reserve Advisory Report regarding branches of Provident and Central-Penn allegedly in competition with one another.

5. Information regarding saving deposit growth of Provident and Central-Penn as compared with mutual savings banks in area.

6. Answers to specific questions raised by the Comptroller pertaining to:

a) The relative growth of loans in the Philadelphia area as compared with other financial centers

b) The integration of Camden, New Jersey banks with the Philadelphia banking community through check clearing procedures

c) Central-Penn's need for additional capital

d) The development of Central-Penn's competitive position since the *PNB-Girard* case

e) The difficulties faced by Central-Penn in building a trust department

f) Central-Penn's need for additional space

g) Central-Penn's management

h) Difficulties experienced by Central-Penn because of its legal lending limit

i) The bank merger trend in Philadelphia

j) The importance of larger banks to the Philadelphia economy

k) Competitive problems resulting from geographic gaps in the branch system of Provident and Central-Penn

7. Information regarding competitive financial institutions.

8. Information regarding mutual customers of Provident and Central-Penn.

9. Additional information regarding branches of Provident and Central-Penn allegedly in competition with one another.

All of the above material is contained in the typewritten record as Exhibit "D" to the motion of defendant banks for final judgment.

ADVISORY REPORT OF THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE.

Jan. 7, 1966

REPORT BY THE
BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
to the
Comptroller of the Currency, under section 18(c) of the Federal Deposit Insurance Act, on the competitive factors involved in the proposed merger of

Provident National Bank, Philadelphia, Pennsylvania

and

Central-Penn National Bank of Philadelphia, Philadelphia, Pennsylvania

I. THE PROPOSAL

Central-Penn National Bank of Philadelphia, Philadelphia, Pennsylvania (Central-Penn) (deposits $327,070,000 as of October 13, 1965), and Provident National Bank, Philadelphia, Pennsylvania (Provident) (deposits $616,742,000 as of October 13, 1965), have requested prior written consent of the Comptroller of the Currency to merge under the charter of Central-Penn and with the title of Provident National Bank.

Central-Penn and Provident operate offices in the Philadelphia area as follows:

County	*Number of Offices* Central-Penn	Provident	Resulting Bank
Philadelphia[a]	13	20[b]	33
Bucks	8	2	10
Delaware	1	5	6
Montgomery	3[b]	5	8
	25	32	57

[a] Boundaries of the city of Philadelphia and county of Philadelphia are identical.

[b] Includes one office which has been approved but not yet established.

The resulting bank contemplates the continued operation of all offices of the two banks.

II. The Communities

The application indicates that the area served by the two banks consists of the Philadelphia Standard Metropolitan Statistical Area, as defined by the United States Bureau of the Budget, which includes the city of Philadelphia, the Pennsylvania counties of Bucks, Chester, Delaware, and Montgomery, and the New Jersey counties of Burlington, Camden, and Gloucester.

The main offices of both institutions are located in Philadelphia, within two blocks of each other. Under Pennsylvania law a bank may operate branch offices in the county in which the head office is located and in counties contiguous to the head office county. The counties contiguous to Philadelphia County (city and county boundaries are identical) are Bucks, Delaware, and Montgomery Counties. As previously indicated both Central-Penn and Provident operate at least one office in all four counties. The community or "relevant geographical market" was defined as this four-county area by the United States Supreme Court in its majority opinion in United States v. Philadelphia National Bank et al. (374 U.S. 320, 359-362 (1963)) and appears to apply to this case as well.

Philadelphia is the fourth largest city in the country. In common with many other large cities, Philadelphia has experienced a movement of people to the surrounding suburban areas during the 1950-1960 decade. The census figures for Philadelphia and the three contiguous counties for 1950 and 1960 are as follows:

	1950	*1960*	*% change*
Philadelphia	2,071,605	2,002,512	− 3.3
Delaware	414,234	553,154	+ 33.5
Montgomery	353,068	516,682	+ 46.3
Bucks	144,620	308,567	+ 113.8
	2,983,527	3,380,915	+ 13.3

In recent years, Philadelphia has been experiencing a period of urban redevelopment in order to eliminate blighted areas and provide more attractive residential sections. The four-county area contains a highly diversified industrial economy.

III. Competition Between the Two Institutions

Both banks operate branch systems in the same general area and offer similar commercial banking and fiduciary services. The head office of each institution is located in the downtown section of the city of Philadelphia, two blocks apart. Central-Penn operates a total of 24 offices and Provident 31 offices. Each bank also has one additional office which has been approved but has not yet opened for business.

Competition between offices of the two banks ranges from prime to virtually none. Both institutions are represented in each of the four counties by at least 1 office. In Philadelphia, both banks operate 5 offices in the downtown area, and Provident has an additional office immediately outside of the downtown area. In that portion of Philadelphia to the north of the downtown section, Provident has 10 offices (plus an approved office which has not yet opened for business) to Central-Penn's 3; in the west, Central-Penn has 4 to Provident's 2; and in the south, both operate 1 office. In Delaware County, Central-Penn's 1 office and Provident's 5 offices are generally in the central section of the county. Of the 5 offices that Provident has in Montgomery County, 2 are in the southeastern portion, 2 in the northeastern, and 1 in the south-central section. Central-Penn's 2 Montgomery County offices (plus 1 which has been approved but not yet opened) are in the southeastern portion of the county. In Bucks County all of Central-Penn's 8 offices are in the eastern section, while the 2 offices of Provident are in the southwestern section of the county. Individual offices of the two banks which are considered to be in competition to a significant degree are listed below by county and, in the case of Philadelphia, by section of the city.

County	*Central-Penn Office*	*Provident Office*
Philadelphia County Downtown:	Main office, N.W. corner Broad and Walnut Streets	Main office, S.W. corner Broad and Chestnut Streets
	21 South 12th Street	12th and Chestnut Streets and Market and Juniper Streets
	17th and Arch Streets	17th and Chestnut Streets
	7th and Chestnut Streets and 2nd and Pine Streets	4th and Chestnut Streets
West Philadelphia:	58th Street and Baltimore Avenue	19 South 52nd Street
North Philadelphia:	Broad Street and Glenwood Avenue	3314 Germantown Avenue
	5th Street and Wyoming Avenue	Broad and Louden Streets
	8325 Stenton Avenue	78th Street and Ogontz Avenue
Delaware County:	301-307 Baltimore Pike, Springfield	731 Powell Road, Springfield
Montgomery County:	600 Park Avenue, King of Prussia Industrial Park, Upper Merion Township	King of Prussia Plaza, Upper Merion Township

In addition to the offices listed above, it would appear that there is potential for competition between the Ardmore office of Central-Penn, which has been approved but not yet opened, and Provident's existing Gladwyne office.

The application indicates that there are 226 common depositors (including individuals, partnerships, corporations, public funds, savings and loan associations, and domestic and foreign correspondent banks having individual account balances in excess of $10,000), with aggregate balances of $48,236,850 in Central-Penn (15 per cent of its total deposits)

and $76,772,000 in Provident (12 per cent of its total deposits). Thirty-three of the common depositors are correspondent banks, which have demand balances of about $10 million at Central-Penn and $12 million at Provident. Eighty-nine of the common depositors are national corporations or large local corporations, which have demand balances of $19 million at Central-Penn and $40 million at Provident. It was also indicated that there are 32 common borrowers (with balances of over $10,000), with loans totaling $12,482,000 at Central-Penn and $20,454,000 at Provident. According to the application "A comparison of lists of consumer credit customers of the two banks would have presented a monumental problem and was not attempted. It is doubtful that more than an insignificant overlap is involved, not only because of the complementary branch systems, but also because of differences in the sources of dealer paper, which comprise $64,000,000 or about 65 per cent, of Provident's outstandings."

An analysis of the deposit and loan accounts of the two banks as of September 30, 1965, is presented in the following schedules (in thousands of dollars).

Deposit accounts

		Central-Penn		*Provident*	
Type of deposit		*Amount*	*Per cent*	*Amount*	*Per cent*
Demand:	IPC[a]	167,731	52.9	322,325	54.1
	Public	17,107	5.4	42,818	7.2
	Other	22,605	7.1	43,861	7.4
	Total demand	207,443	65.4	409,004	68.7
Time:	IPC	91,876	29.0	149,105	25.0
	Public	15,915	5.0	30,694	5.2
	Other	2,030	0.6	6,709	1.1
	Total time	109,821	34.6	186,508	31.3
		317,264	100.0	595,512	100.0

[a] Individuals, partnerships, and corporations.

Loan account (gross)

Type of Loan	*Central-Penn Amount*	*Central-Penn Per cent*	*Provident Amount*	*Provident Per cent*
Real estate loans:				
Residential	1,958	0.9	13,950	3.4
Commercial	16,145	7.1	9,672	2.3
Farm	78	—	276	0.1
Total real estate loans	18,181	8.0	23,898	5.8
Financial institutions	18,820	8.3	46,470	11.3
Purchase or carry securities	923	0.4	23,252	5.6
Farm	45	—	292	0.1
Commercial and industrial	105,923	46.8	195,651	47.5
Installments	76,222	33.7	112,037	27.2
Other	6,255	2.8	10,544	2.5
Total loans	226,369	100.0	412,144	100.0

As indicated in the above schedules, both banks have about two-thirds of their deposits in the demand category. The major portion of each loan portfolio is commercial and industrial loans, with consumer instalment loans next in importance.

As of September 30, 1965, loans represented 71 per cent of deposits at Central-Penn and 69 per cent of deposits at Provident. Both banks pay 4 per cent on savings accounts and offer savings certificates or savings bonds at 4½ per cent. The current legal lending limit is $2,500,000 and $7,000,000 at Central-Penn and Provident, respectively.

Both banks offer fiduciary services, but Central-Penn's trust department is considerably smaller than Provident's.

In summary, both banks operate branch systems in the same general area and offer similar banking and fiduciary services. There is a great deal of similarity between the deposit structures and composition of the loan portfolios. The application indicates that the two banks are complementary, rather than competitive, because of the relative location of branch offices, and because of the lack of competition in certain services offered such as fiduciary services, in-

ternational operations, and construction loans. It is also noted that even where the offices of the two banks do compete there is usually an office of a larger bank in the same area. It seems apparent that the variance in the legal lending limit of the two banks tends to lessen competition for the larger commercial loans. However, it also seems apparent that a number of the offices of the two banks are either currently or potentially significant competitors, and that generally the two banks are prime competitors in "retail" banking and also compete to some extent in "wholesale" banking, particularly for business of medium-size concerns. From the foregoing, it is clear that a significant degree of competition exists between the two institutions.

IV. Effect on Other Institutions

As of October 13, 1965, the Philadelphia four-county area was served by 34 commercial banks, which operated 377 banking offices in the area and held IPC deposits of $5.1 billion and total loans of $4.2 billion. Because of their size and the presence of at least one branch office in each of the four counties, Central-Penn and Provident are considered, generally, to be in competition with all of the other banks in the area. Such competition, however, varies considerably in intensity within the four-county area. Both banks are prime competitors with other banks in Philadelphia. Outside of Philadelphia, Provident's most intensive operation is in Delaware County, while Central-Penn's most intensive area of operation is in the eastern section of Bucks County. The following schedule reflects the banking structure of the Philadelphia four-county area, with amounts listed in thousands of dollars as of October 13, 1965.

Name of bank	IPC deposits	%	Loans	%	Banking Offices	%
CENTRAL-PENN	273,570	5.4	219,400	5.2	25[1]	6.5
PROVIDENT	495,778	9.7	411,317	9.9	32[1]	8.4
Resulting bank	769,348	15.1	630,717	15.1	57	14.9
Philadelphia						
The First Pennsylvania Banking and Trust Company	1,027,612	20.2	957,077	22.9	49	12.8
The Philadelphia National Bank	897,052	17.6	792,379	19.0	37	9.7
Girard Trust Bank	825,394	16.2	626,585	15.0	50[1]	13.1
Fidelity-Philadelphia Trust Company	653,906	12.8	494,621	11.8	49[1]	12.8
Frankford Trust Company (nonmember)	60,380	1.2	44,002	1.0	5	1.3
Six other commercial banks[2]	30,657	0.6	24,864	0.6	8	2.1
Delaware County						
The Delaware County National Bank, Chester	84,422	1.7	50,793	1.2	9	2.4

[1] Includes one office approved but not open.

[2] Includes the Philadelphia office of Brown Brothers Harriman & Company, New York. As of June 30, 1965, this company had deposits of $268 million.

Name of bank	IPC deposits	%	Loans	%	Banking Offices	%
Montgomery County						
Continental Bank and Trust Company, Norristown (nonmember)	293,974	5.8	238,736	5.7	38	10.0
Industrial Valley Bank and Trust Company, Jenkintown (nonmember)	141,106	2.8	108,075	2.6	24	6.3
Ten other commercial banks	194,225	3.8	136,078	3.3	40	10.5
Bucks County						
Bucks County Bank and Trust Company, Perkasie	24,737	0.5	16,424	0.4	4	1.0
Seven other commercial banks	93,094	1.7	56,833	1.4	12	3.1
	5,095,907	100.0	4,177,184	100.0	382	100.0

Currently, Provident is the fifth largest bank in the Philadelphia four-county area in terms of IPC deposits and loans, and it ranks sixth in terms of banking offices. Central-Penn ranks seventh in these three categories. If the proposed merger is consummated, the resulting bank would rank fourth in size based on IPC deposits, third in size based on loans, and first in size based on the number of banking offices. In addition to having the most offices, the geographical coverage of such offices in the four-county area would be the most thorough and extensive of the area banks. With regard to the trust department, Provident currently ranks fourth behind First Pennsylvania, Girard, and Fidelity in the value of assets held and, if the merger is consummated, it would still rank fourth in the value of assets held although it would be first in the number of individual accounts under administration. Concerning the Philadelphia area, the resulting bank, with its increased lending limit and its branch system enlarged, would be in a position to compete more effectively with the three largest Philadelphia banks; namely, The First Pennsylvania Banking and Trust Company, The Philadelphia National Bank, and Girard Trust Bank.

There has been a significant decline in the number of banks headquartered in Philadelphia in the past several years. In June of 1952, there were 32 commercial banks in Philadelphia, compared to 13 at the present time. Consummation of the proposed transaction would further this trend.

The five largest banks in Philadelphia now hold about 77 per cent of the total IPC deposits held by commercial banks in the Philadelphia four-county area. This latter percentage would be increased to 82 per cent if the proposed transaction is consummated. As noted in the above schedule, the bank resulting from this proposed transaction would hold about 15 per cent of the IPC deposits held by banks in the Philadelphia four-county area and rank fourth in this respect. The three largest banks would hold approximately 20 per cent, 18 per cent, and 16 per cent, respectively, with the fifth largest bank holding about 13 per cent. In this respect,

it should be noted that the structure of commercial banking in the Philadelphia four-county area is not unduly concentrated as compared with the nation's major standard metropolitan statistical areas. As of June 30, 1964, the largest bank in the area controlled 21.8 per cent of the area's commercial bank deposits. In only 14 of 84 other major metropolitan areas did the largest bank have a smaller market share. The three largest Philadelphia banks' share was 54.7 per cent; only 16 major SMSA's had lower 3-bank concentration ratios.*

According to the application, "In the field of wholesale banking, all Philadelphia commercial banks operate in the shadow of New York." The application also states:

> "Additional outside competition is encountered from the larger Pittsburgh banks, particularly the Mellon National Bank and Trust Co. and the Pittsburgh National Bank. The Mellon bank is substantially larger than the largest Philadelphia bank. Like the New York banks, the Pittsburgh banks regularly send representatives to solicit business in Philadelphia."

As an indication of some of the competition with banks outside the metropolitan area, the application notes that of 78 customers of Central-Penn with formal confirmed commercial lines of credit—totaling approximately $91,000,000—approximately 59 per cent of the customers (58 per cent of the total amount) are customers also having lines from banks outside the Philadelphia area. Corresponding percentages for 341 such customers of Provident, with lines totaling approximately $343,000,000, were approximately 44 per cent and 60 per cent.

* As regards the entire Philadelphia Standard Metropolitan Statistical Area, on June 30, 1964, the largest bank in the area controlled 19.3 per cent of the area's commercial bank deposits. In only 8 of 84 other major metropolitan areas did the largest bank have a smaller market share. The three largest Philadelphia banks' share was 48.3 per cent; only 11 major SMSA's had lower 3-bank concentration ratios.

Further competition is offered in the Philadelphia area by 4 mutual savings banks, which have more than 50 branches in the metropolitan area, savings and loan associations, which are said to be in direct competition with commercial banks in all areas, 300 life insurance companies, 285 credit unions, 100 sales finance companies, 300 small loan and consumer discount companies, 15 factoring companies, and direct lending agencies of the Government.

V. Conclusion With Respect to Competitive Factors

Consummation of the proposed merger of Central-Penn National Bank of Philadelphia and Provident National Bank, Philadelphia, would eliminate significant competition existing between the banks, particularly in the downtown area of Philadelphia where each bank has its head office and several branches. In addition, the proposed transaction would eliminate 1 of 13 banks headquartered in Philadelphia, in which city there has been a substantial decline in the number of banks during the past several years.

The overall effect of the proposed merger on competition would be significantly adverse.

NOTE

As required by section 18(c) of the Federal Deposit Insurance Act, this report is limited to "a report on the competitive factors involved," and is not a recommendation as to whether the application should be approved or disapproved.

ADVISORY REPORT OF THE DEPARTMENT OF JUSTICE

DEPARTMENT OF JUSTICE
WASHINGTON 20530

January 7, 1966

Honorable James J. Saxon
Comptroller of the Currency
Treasury Department
Washington, D. C.

Dear Mr. Saxon:

This is in response to your letter of December 7, 1965, which requested a report pursuant to the provisions of Section 18(c) of the Federal Deposit Insurance Act with respect to the proposed merger of Central-Penn National Bank of Philadelphia, Philadelphia, Pennsylvania (Central-Penn) and Provident National Bank, Philadelphia, Pennsylvania (Provident).

Central-Penn adopted its present name in 1930 upon the merger of Central National and Penn National Banks. Its 24 banking offices in operation are located in Philadelphia County and the contiguous counties of Bucks, Delaware and Montgomery, the maximum area permissible under Pennsylvania law for a bank based in Philadelphia. On September 30, 1965, Central-Penn held total assets of $370 million, total loans of $226 million and total demand deposits of $224 million. Central-Penn's net current operating income for the past five years has averaged $4.3 million.

Provident was incorporated in 1922 "to take over the banking, trust and other fiduciary business of Provident Life and Trust Company." As of September 30, 1965, Provident held total assets of $699 million, total gross loans of $412 million and total demand deposits of $443 million: Provi-

dent's net current operating income has shown a steady increase for the past four years from $9.5 million in 1961 to $10.4 million in 1964. Provident's 32 banking offices are located throughout Philadelphia, Bucks, Delaware and Montgomery Counties.

The Market for Banking Services

It is generally accepted that the relevant market for most banking services is limited to local geographic areas. These normally refer to metropolitan areas, but with some important modification. The area within which banks can legally open branch offices has been demonstrated to be a relevant consideration. For example, state boundaries distinguish banking markets from one another because of the prohibition against branching across state lines.

In the *Philadelphia National Bank* case, 374 U.S. 321, 359-62 (1963), the Supreme Court concluded "that the four-county Philadelphia metropolitan area, which state law apparently recognizes as a meaningful banking community in allowing Philadelphia banks to branch within it, and which would seem roughly to delineate the area in which bank customers that are neither very large nor very small find it practical to do their banking business, is a more appropriate 'section of the country' in which to appraise the instant merger than any larger or smaller or different area." (374 U.S. at 361)

This view of the relevant market should be contrasted to that used in the application, where two diametrically opposite market definitions are set forth in order to justify this merger. It postulates both very large and very small market areas. First, to negate *inter se* competition between Provident and Central-Penn, the Application presumes that the relevant market is limited by the proximity of branch offices. Secondly, to minimize the high concentration among Philadelphia banks, the Application includes all banks within the Philadelphia Standard Metropolitan Statistical Area, which is comprised of five Pennsylvania counties and three New

Jersey counties. This is done in spite of the fact that Philadelphia-based banks can only branch in four of these eight counties.

Market Concentration

Our calculations of market concentration include all banks (as listed in the Application) with head offices in the four-county area (Philadelphia, Bucks, Delaware and Montgomery) within which Philadelphia-based banks may branch. This results in 33 banks with head offices in the relevant four-county trade area. The respective shares held by the largest seven of these banks are reported in the following table:

Market Shares in the Philadelphia Banking Market
June 30, 1965

Banks	*Total Assets*		*Total Demand Deposits (IPC)*		*Total Gross Loans*	
	$ million	*%*	*$ million*	*%*	*$ million*	*%*
First Penna.	1,564	21.3	627	20.0	924	22.4
Phila. Natl.	1,408	19.2	548	17.4	733	17.8
Girard	1,055	14.4	469	14.9	628	15.2
Fidelity-Phila.	850	11.6	368	11.7	480	11.6
PROVIDENT	683	9.3	326	10.4	398	9.7
CENTRAL-PENN	369	5.0	170	5.4	210	5.1
Continental	366	5.0	185	5.9	228	5.5
	6,295	85.8	2,693	85.7	3,601	87.3
26 Others	1,054	14.3	448	14.3	522	12.7
Totals	7,349	100.0	3,141	100.0	4,123	100.0

Source: The Application to Merge.

This proposal would combine the fifth largest (Provident) with the sixth largest (Central-Penn). The resulting bank would control 14.3% of total assets, 15.8% of IPC demand deposits, and 14.8% of bank loans in the four-county area, and would be the third or fourth largest bank within this market area.

For several years past there has been a definite merger trend among Philadelphia area banks. The Supreme Court noted the decline in the number of banks headquartered in the four-county area from 108 in 1947 to 42 at the time of the decision. (374 U.S. at 331) If the proposed merger is consummated, the number of banks will be reduced to 32. This area is, moreover, already highly concentrated, with the seven largest banks together holding approximately 86% of total assets, 86% of IPC demand deposits, and 87% of total bank loans.

Conclusions

As can be seen from the previous statistics, this merger is a strictly horizontal affiliation which leads to considerably higher levels of concentration. Concentrated market structures, moreover, are likely to be crucial factors which contribute to the exercise of market power. There are strong reasons, therefore, for believing that the proposed merger would have an important adverse effect on the extent of competition within the Philadelphia banking market. In addition, it should be noted that these banks are already quite large and there are few gains to be derived from further increases in size. It appears, thus, that the anticompetitive effects of this merger are important and considerable and that there are likely to be no redeeming features.

A summary of this report is attached.

Sincerely yours,

DONALD F. TURNER
Assistant Attorney General
Antitrust Division

SUMMARY OF THE REPORT OF THE DEPARTMENT OF JUSTICE ON THE COMPETITIVE FACTORS INVOLVED IN THE PROPOSED MERGER OF CENTRAL-PENN NATIONAL BANK OF PHILADELPHIA, PHILADELPHIA, PENNSYLVANIA, AND PROVIDENT NATIONAL BANK, PHILADELPHIA, PENNSYLVANIA

There is considerable evidence that Philadelphia plus the three contiguous counties within Pennsylvania comprise the relevant geographic market for banking services. This proposal would combine the fifth largest (Provident) and the sixth largest (Central-Penn) of the 33 banks with head offices located in this four-county area (Philadelphia, Bucks, Delaware and Montgomery Counties). The resulting bank would control 14.3% of banking assets, 15.8% of IPC demand deposits and 14.8% of total bank loans outstanding. It would be the fourth largest bank with headquarters in the four-county area. This area is already highly concentrated with the seven largest banks together holding approximately 86% of total assets, 86% of IPC demand deposits and 87% of bank loans originating in the area.

This merger is a strictly horizontal affiliation which leads to considerably higher levels of concentration. There are strong reasons, thus, for believing that the proposed merger would have an important adverse effect on competition within the Philadelphia banking market. The anticompetitive effects of this merger are important and considerable and there are likely to be no redeeming features.

DECISION OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATION TO MERGE CENTRAL-PENN NATIONAL BANK OF PHILADELPHIA, PHILADELPHIA, PENNSYLVANIA, AND PROVIDENT NATIONAL BANK, PHILADELPHIA, PENNSYLVANIA, UNDER THE CHARTER OF THE FORMER AND WITH THE TITLE OF PROVIDENT NATIONAL BANK

STATEMENT

On December 6, 1965, the Central-Penn National Bank of Philadelphia, Philadelphia, Pennsylvania, and the Provident National Bank, Philadelphia, Pennsylvania, applied to the Office of the Comptroller of the Currency for permission to merge under the charter of the former and with the title of Provident National Bank.

This application to merge is the first filed by banks of significant size to be acted upon by this Office since the passage of the 1966 Amendment to the Bank Merger Act. The new law, passed by Congress to moderate the decisions of the Supreme Court in *U.S. v. Philadelphia National Bank, et al.*, 374 U.S. 321 (1963) and *U.S. v Lexington* 376 U.S. 665 (1964), recognizes that traditional anti-trust concepts cannot be applied to banking without substantial modification. If a realistic view is to be taken, it must start with a rejection of the traditional anti-trust concepts which Congress has recognized to be inapplicable to the banking industry. Congress, relying on the specialized knowledge of the banking agencies, has given them the task of interpreting the new statutes.

The significant provisions controlling agency action on a bank merger application are set forth in Section 5(B) of the new Act.[1] This section permits the responsible agency to balance the convenience and needs of the community, con-

[1] Section 5(A), which provides that the responsible agency shall not approve a bank merger which would result in a monopoly or constitute an attempt to monopolize the business of banking, is not applicable in this case.

sidering the managerial and financial resources of the participating banks and the resulting bank, which the merger will serve against the anti-competitive effect the merger may produce. If the convenience and needs of the community to be served clearly outweigh the anti-competitive aspects, the merger must be approved.

The first question to be considered, therefore, is the impact of the proposed merger on competition. Competition among financial institutions, as in other industries, must exist in a certain market referred to in the statute as a "section of the country." The extent of this market is dependent upon the various services provided by financial institutions. While virtually all banks and other financial institutions compete on the local neighborhood basis for the deposits of the average householder, only the larger institutions can sucessfully compete in the national market for the large credits of industrial and commercial customers doing business throughout the nation. Only a limited number of American banks compete in the international market. Thus, in this case, as in every other to arise under the new law, the extent and degree of competition among the applicant banks and other financial institutions must be evaluated in all its aspects. It no longer suffices to say that since some competition among banks, either actual or potential, is eliminated, the merger is to be condemned.

Although both Provident National Bank and Central-Penn National Bank, the participants in this proposal, are headquartered in Philadelphia and both operate branch bank systems in the four-county area comprised of Philadelphia, Bucks, Delaware and Montgomery Counties, as is permitted by state statutes, this area does not constitute the "section of the country" under the new statute. Although the Supreme Court in the Philadelphia case ruled that this four-county area was the relevant market, when interpreting Section 7 of the Clayton Act, the new statute, designed to modify that decision, permits a new and realistic approach. Money, either in the form of savings, deposits, or credits,

moves with great ease and rapidity; its flow is not impeded by political boundary lines. The movements of money in and out of a bank are determined by the convenience and needs of its many and varied customers, whose scattered addresses serve to define the extension of the bank's market. Thus, the branch banking laws of the states do not effectively define a bank's market. In this case, while it is proper to examine competition among branches for local retail and household deposits, it is also necessary to view total competition among all financial institutions in the Philadelphia area, including the adjacent sections of New Jersey, as well as in the northeastern part of the United States.

The proximity of New York City, the Nation's financial center, means that the Philadelphia banks also face strong competition from New York banks. Judge Clary, in his District Court opinion in the *Philadelphia* case, stated then, as is still more clearly the case today, that:

> The evidence demonstrated beyond peradventure of doubt that the Philadelphia area, plus parts of Delaware and New Jersey, and also New York City, as well as most of the northeastern part of the United States, is the area of active competition for Philadelphia commercial banks and for the proposed merged bank. The testimony discloses that the competitive effect upon all Philadelphia commercial banks will be minimal. The larger bank, however, will be able to compete on better terms and in a better atmosphere with the banks of other cities and states that have been draining this area of banking business which might well be and perhaps properly should be handled here, and which cannot be handled under present circumstances. That it will benefit the city and area has been established clearly by a fair preponderance of the evidence.

Though Section 5(b) of the 1966 Amendment to the Bank Merger Act bears some resemblance to Section 7 of the Clayton Act, the difference is most marked in that the new bank

merger statute makes no reference to "line of commerce." The new statute allows consideration of a bank merger in the context of all competing financial institutions operating in the market. It is thus much more realistic than the narrow *Philadelphia* rule. Henceforth, the competitive impact of a bank merger must be assessed in the light of savings banks, insurance companies, savings and loan associations, credit unions, finance companies, small loan companies, factors, and even department stores and mail order houses, that compete for the credit lines or the savings dollar of the public.

The Provident National Bank and the Central-Penn National Bank, respectively the fifth and seventh largest commercial banks in Philadelphia, serve a standard metropolitan statistical area which is the second in size in the eastern United States. The Philadelphia standard metropolitan statistical area is comprised of Philadelphia County, which is coextensive with the city, Bucks, Chester, Delaware and Montgomery Counties in Pennsylvania, as well as Burlington, Camden and Gloucester Counties in New Jersey. This area, an important segment in the rapidly expanding megalopolis of the eastern seaboard, has an estimated population of 4,300,000 people. More than 25,000,000 people live within 100 miles of Philadelphia. Only by evaluating this proposed merger against the social, economic and financial resources at work in this vast and densely populated area can its impact be assessed. Its competitive effect must be viewed in the light of the overall financial structure of this area; its beneficent effect upon convenience and needs of this area must be seen in the perspective of the commercial, industrial, cultural and sociological composition of the area.

A comprehensive view of the Philadelphia area economic base reveals that it is comprised not only of many large, medium-sized and small industrial companies but also of a wide range of wholesale and retail establishments and service companies in addition to educational, governmental and research facilities. The 1963 U.S. Department of Commerce Census of Business gives the following statistics for the

Philadelphia area: 8,125 manufacturing plants with a total payroll of $3,320,970,000 and value added of $5,987,310,000; 7,476 wholesale establishments with a payroll of $530,541,000 had sales of $10,252,356,000; 39,358 retail stores with a payroll of $666,822,000 had sales of $5,737,442,000; and 22,809 selected service establishments with payrolls of $321,010,000 had receipts of $1,074,494,000.

This highly diversified Philadelphia area economy presents needs for the widest possible range of banking services. Nearly 90% of all classes of manufacturing output as recognized by the U.S. Department of Commerce are represented in this metropolitan area. The proportion of the nation's value added in five major industries by Philadelphia-based companies is as follows: petroleum and coal, 5.8%; apparel, 5%; chemicals, 4.6%; rubber and plastics, 4.4%; and fabricated metals, 5.1%.

The significance of manufacturing to the Philadelphia area is attested by the fact that some 35% of all gainfully employed workers are on the payrolls of manufacturing plants. The employment profile of the area is as follows: manufacturing durable, 17.3%; manufacturing non-durable, 17.6%; trade, 19.8%; service and miscellaneous, 15.2%; government, 12.9%; transportation and utilities, 7%; finance, insurance, and real estate 5.5%; and construction 4.7%.

Though manufacturing is especially important to the Philadelphia area, no single segment dominates its economy. Only two industries, electrical machinery and apparel, account individually for more than 10% of manufacturing employment. In the electrical equipment field the presence of Electric Storage Battery, I-T-E Circuit Breaker Co., International Resistance and Progress Manufacturing together with major establishments of Radio Corporation of America, General Electric, Burroughs, Philco, Sperry Rand and Westinghouse make this area one of the world's greatest concentrations of electrical and electronics manufacturing plants. In the apparel field, the area's second largest manufacturing industry, there are a great many small, independently op-

erated firms among which are many with a long history in the business.

Other manufacturing industries contribute to the prosperous economic base of this area. There are some 700 metal manufacturers, such as Lukens Steel and Alan Wood Steel. U. S. Steel also maintains its famous Fairless Works in this area. The Budd Company, long a leading supplier of transportation equipment, is expanding its local operations to include work in metallurgy, electronics and plastics. Pennsylvania Sugar and Franklin Sugar make the area a leader in sugar refining. Leeds and Northrup, a local firm, manufactures instruments here, as do plants of Honeywell. Chilton and Curtis are great names in publishing. Scott Paper is a Philadelphia-based national leader in the paper industry. SKF Industries makes bearings and has major plants here. Campbell Soup has its headquarters just across from Philadelphia, in Camden, New Jersey. Much of the manufacturing potential of the Philadelphia area is directed to the production of military supplies and national defense material.

Philadelphia is the site of a United States Mint and a center for other civilian federal functions, as well as for activities of the Commonwealth of Pennsylvania.

The wholesale and retail trades employ 19.8% of the area workers and account for $15.990 billion in annual sales. Two of the nation's ten largest merchandising firms, Acme Markets, with annual sales of $1.161 billion, and Food Fair Stores, with annual sales of $1.105 billion, are among this number.

In the petro-chemical industry, the Philadelphia complex ranks second in the nation. The two locally headquartered firms in the oil area are Atlantic Refining, with $636 million in annual sales, and Sun Oil, with $838 million in annual sales. Other oil producing and processing firms with plants in the area are Gulf, Mobil and Sinclair, which are among the country's largest. The chemical industry located in the area has grown spectacularly between 1958 and 1962 when its value added increased 35% and its employment increased

12%. Recent plant and equipment investments by such firms as Rohm and Haas, Pennsalt, DuPont and Thiokol indicate the vitality of this industry. Pharmaceutical plants, a specialized chemical industry, have also contributed to Philadelphia's recent growth. The Smith, Kline and French Laboratories, and William H. Rorer have recorded excellent profits. Wyeth; Merck, Sharp and Dohme; McNeil, and other famous firms with manufacturing and research laboratories have contributed to the economy of the area.

The Philadelphia area has become a national center of research and development, especially in the bio-medical sciences and electronics, because of the close cooperation among industry, independent research institutions and the area's colleges and universities. A new Science Center, near the campuses of Drexel Institute of Technology and the University of Pennsylvania, will further foster and extend this cooperation. The Franklin Institute conducts industrial research in its independent laboratories in chemistry, physics, electronics and engineering. National Science Foundation data indicate that, in 1962, 3,700 scientists were engaged in research and development in the Philadelphia metropolitan area. Their efforts were concentrated in chemistry, physics, and the biological sciences.

Another very significant factor contributing to the economic base of the Philadelphia standard metropolitan statistical area is its seaport. This port, which is part of a vast complex stretching from Trenton, New Jersey, on the north to Wilmington, Delaware, on the south, serves thirteen states in which one-third of the nation's population lives and works. Having handled 108.9 million short tons in 1964, it ranks second only to New York in total water-borne commerce and is first in foreign commerce. Its importance to the economy of the area can hardly be exaggerated; it provides, directly or indirectly, more than 96,000 jobs and 20% of all manufacturing jobs depend on raw materials received through the port.

The port can accommodate 150 deep-draft vessels at its docks, and a 40-foot channel has been dredged up river to the

U.S. Steel Fairless plant. Three trunk line railroads run direct to shipside and are interconnected by the Philadelphia Belt Line Railroad. Over-the-road service to all parts of the United States and Canada from this port is furnished by approximately 350 motor truck lines. The port has three ore piers with unloading capacity of 5,600 tons per hour; six oil docks with storage capacity of 9,900,000 barrels; two grain elevators with a capacity of 4¾ million bushels; three coal tipples with capacity of 37,500 tons per eight-hour day; eighty-one warehouses for general storage with 13.5 million square feet of space; and nine cold storage warehouses with nearly 12 million cubic feet of space.

Since colonial days educational, scientific and cultural activities have contributed to the economic vitality of Philadelphia and its environs. Today there are 54 colleges and universities, including six major medical schools and 129 hospitals, as well as many other respected scientific and cultural institutions serving the area's needs.

Philadelphia is also a major transportation center. Of the railroads serving the city, the Pennsylvania Railroad and the Reading Company are locally headquartered. The International Airport, located only twenty minutes from the center of the city, is becoming an attraction for new business development. Philadelphia is also served by a network of superhighways centering on the Pennsylvania and New Jersey Turnpike.

The City of Philadelphia faces severe problems typical of many American urban centers today. It has experienced a substantial exodus of population to the suburbs and those who moved out have been replaced mostly by unskilled immigrants from the south, who, due to their lack of training, are handicapped in finding employment. Efforts have been made by both government and private citizens to revitalize the economy of Philadelphia and a number of projects are presently in progress. In the field of housing, a massive plan has been set in motion to replace substandard housing facilities in the city. Steps are also being taken to improve cargo handling facilities.

Against this background of the Philadelphia area's manufacturing, commercial, scientific and cultural base, it is appropriate to examine the financial resources available to meet its expanding credit needs. Such an examination must, of necessity, encompass not only commercial banks but also the savings banks, savings and loan associations, insurance companies, small loan companies, credit unions, factors and other financial institutions.

Such an analysis of the Philadelphia area financial structure must consider the 84 commercial banks, operating 515 offices, with total assets of $8.495 billion; four mutual savings banks having withdrawable balances of $2.861 billion; 260 savings and loan associations with $2.555 billion in total assets; 300 insurance companies, including seven large Philadelphia-based insurance companies with assets of $3.846 billion; 285 credit unions in the city of Philadelphia alone; and about 100 sales finance companies, about 300 small loan companies, and 15 factoring offices, the aggregate Philadelphia resources of which are unavailable. Direct governmental lending agencies are competitive to a lesser extent than the private financial institutions.

Philadelphia, the fourth largest metropolitan area in the nation, has a relatively low concentration of banking resources. Out of 34 standard metropolitan statistical areas with limited branching, the Philadelphia area ranks only 25th in terms of concentration based on the five largest banks in each area.

Of the 84 commercial banks located in the Philadelphia area, only three have total deposits of more than one billion dollars. The largest of these is the First Pennsylvania Banking and Trust Company, which has total deposits of $1.459 billion and operates 45 branch offices. The second is the Philadelphia National Bank, with deposits of $1.292 billion and 36 offices. Girard Trust Bank, with $1.013 billion in deposits and 50 branches, is third. None of these banks, which rank 19th, 26th and 37th, respectively, among the nation's commercial banks, are near the size of the Mellon National Bank of Pittsburgh.

The charter bank, with IPC deposits of $260 million, was originally organized in 1864 as the Central National Bank. It acquired its present title in 1930 when Central National Bank merged with Penn National Bank. During the last five years, however, it has had no mergers. The charter bank presently operates twenty-four offices throughout Philadelphia, Bucks, Montgomery, and Delaware Counties. Central-Penn has specialized in medium-sized local business loans and has built up over the years a strong and experienced commercial loan department. The bank needs additional capital to support its existing volume of business. Its head office is inadequate and congested. The renovated quarters of the resulting bank and its new accounting center will alleviate this problem.

The merging bank, with IPC deposits of $471 million, was originally incorporated in 1922 as Provident Trust Company of Philadelphia to take over the banking and trust business of Provident Life and Trust Company; it became a national bank in 1964. The Provident National Bank is presently operating thirty-three offices throughout Philadelphia, Bucks, Montgomery, and Delaware Counties. Besides being a strongly capitalized bank, Provident has one of the largest trust departments in the Philadelphia area, as well as an established international division, and a specialized construction loan department. Among the remaining area banks, there are ten with resources of $100 million and over, which assure a satisfactory range of services to the medium-size customer.

Commercial banks compete not only with each other, but with many other types of savings and financial institutions strongly represented in the area. There are four mutual savings banks with head offices in Philadelphia operating more than 50 branches in the metropolitan area and having withdrawable balances of $2.861 billion. These institutions are well managed, with records of sound operation dating from 111 to 149 years. The Philadelphia Savings Fund Society, the major savings bank, is the largest bank in Eastern

Pennsylvania. These mutuals have paid a high rate of interest on regular savings accounts, which has contributed much to the amazing growth rate of their savings deposits of 51.9% over 1960.

Insured savings and loan associations, with $2.555 billion in total assets, compete vigorously in the metropolitan area for personal savings and also solicit corporate funds. Emphasizing the savings function, the high dividend rate, federal insurance and, frequently, valuable premiums on new accounts, they successfully compete with mutual savings and large commercial banks for savings and mortgage loans. There is no area in the city where the commercial banks are not in direct competition with a nearby office of a savings and loan association. Moreover, many out-of-state savings and loan associations from as far away as California solicit deposits by mail, emphasizing the high interest rates offered. First Pennsylvania cited the drain of deposits resulting from such out-of-state competition as a principal reason for its recent decision to offer five-year, 4½% savings bonds, now also offered by most other Philadelphia banks. It is significant that savings deposits and mortgage loans of the eight largest Philadelphia commercial banks amounted in the aggregate to only 16.94% and 6.99%, respectively, of the combined totals for such banks, the four mutual savings banks, and the insured savings and loan associations in the area as of December 31, 1964.

There are more than 300 insurance companies with offices in the city. The seven largest insurance companies with headquarters in Philadelphia are: Pennsylvania Mutual Life, with assets of $2,068,973,000, mortgage loans of $625,256,000, and policy loans of $140,358,000; Provident Mutual Life, with assets of $989,936,000, mortgage loans of $328,387,000 and policy loans of $58,626,000; Fidelity Mutual Life, with assets of $442,770,000, mortgage loans of $146,061,000, and policy loans of $30,216,000; Philadelphia Life, with assets of $109,355,000, mortgage loans of $36,822,000 and policy loans of $6,646,000; Presbyterian Ministers' Fund, with assets of

$95,760,000, mortgage loans of $19,098,000 and policy loans of $6,428,000; Home Life, with assets of $95,338,000, mortgage loans of $45,612,000 and policy loans of $3,039,000; and Life Insurance Company of North America, with assets of $44,716,000, mortgage loans of $7,660,000 and policy loans of $1,354,000. The three largest companies have been very active in private placement financing; they are joined in competition for local financing by all of the leading national life insurance companies and many Canadian companies as well. All of these and many smaller companies actively solicit real estate mortgages for investment. Some companies maintain their own mortgage offices in Philadelphia while others rely upon local mortgage service companies for their supply.

There are reported to be 285 credit unions in the urban Philadelphia area. There are no statistics on the number of credit unions in the entire metropolitan area. Credit unions make the most of their competitive position, emphasizing mutual ownership, low interest rates on loans, in some cases the payroll deduction method of loan repayment and savings, and convenience of access to credit union facilities.

There are about 100 sales finance companies and about 300 small loan and consumer discount companies operating within the service area of the resulting bank. Many of these companies have large branch office systems. Beneficial Finance Companies have 14 offices, Household Finance Corporations have 26 offices, and Ritter Finance Companies have 18 offices. All of these companies compete aggressively with commercial banks for automobile, home modernization, and personal loan financing.

There are 15 factoring companies with offices in the city of Philadelphia. These companies compete in the accounts receivable finance market.

The consummation of the proposed merger will not result in the elimination of a significant amount of competition between the applicant banks. Provident and Central-Penn face branch office competition from the offices of the largest

Philadelphia banks rather than from each other, except in the immediate Philadelphia downtown area. For this reason, a minimal number of common accounts exists between them. There are only 28 mutual customers out of a combined total of 3,277 savings accounts with balances of $10,000 or more; nine mutual holders of the new 4½% savings certificates of each bank out of a total of 2,512 accounts; eight mutual depositors out of 444 with certificates of deposit; and four mutual customers with open time deposit balances in excess of $10,000 out of 281 accounts. A comparison of all regular checking accounts with balances of $10,000 or more in each bank disclosed only 139 mutual accounts out of 6,614, and a comparison of loan balances of $10,000 or more for each bank disclosed only 32 mutual borrowers out of 3,287. As to consumer credit customers of the two banks, due to the complementary branch systems and differences in the sources of dealer paper, it is doubtful that more than an insignificant overlap is involved.

The following analysis of the dispersion of the branch offices of the applicant banks clearly reveals the limited extent to which the banks compete for the deposits of the small retail customers. As previously noted, Pennsylvania law permits branching into the counties contiguous to the home county, and while both banks operate branch offices in Philadelphia and at least one office in each of the three contiguous counties, the locations of these offices are such that, except in the downtown area, they are not in significant competition with each other. Of the twenty-four offices Central-Penn presently operates throughout this four-county area, thirteen are located in Philadelphia: four downtown, three to the north of the downtown area, four to the west, and two to the south. Provident is presently operating thirty-three offices in the four-county area, twenty of which are located in Philadelphia: five downtown, one immediately outside of the downtown area, eleven north of the downtown area, two west, and one south. In Delaware County, Provident is well represented with six offices, while Central-Penn has but one. On

the other hand, Central-Penn has eight offices in Lower Bucks County, while Provident has two offices in Upper Bucks County. In Montgomery County, Provident has five offices, two in the southwest section, two in the northeast section and one in the west-central part, while Central-Penn has only two offices in the southeastern section of the county. Subsequent discussion will show that the participating banks' branches in these last three counties do not compete with each other because of their locations. These branches, in fact, will complement one another when the merger is consummated.

In downtown Philadelphia, the main office of Central-Penn is located at the corner of Broad and Walnut Streets, only a block away from the main office of Provident at the corner of Broad and Chestnut Streets. Within .4 of a mile of Provident's office are eight commercial banks, some with several offices; two savings banks; one savings and loan association; ten finance and small loan companies; four credit unions; and twelve insurance companies. Central-Penn's office is within .3 of a mile of eight commercial banks, one savings bank, six savings and loan associations, twenty-six finance and small loan companies, two credit unions, and two insurance companies.

Competition also exists among the branch offices of the two banks located at 21 South 12th Street, 12th and Chestnut Streets, and Market and Juniper Streets. These offices are in the same area. However, within .3 of a mile from Provident's office at 21 South 12th Street are five commercial banks, three savings banks, two savings and loan associations, ten finance and small loan companies, and four credit unions. Central-Penn's office at 12th and Chestnut Streets is within .5 of a mile of four commercial banks, two savings banks, six savings and loan associations, sixteen finance and small loan companies, three credit unions, and one insurance company. Within .4 of a mile from Central-Penn's office at Juniper and Market Streets are three commercial banks, a savings bank, three savings and loan associations, six finance and small loan companies, and two insurance companies.

No significant competition exists among any of the other branch offices of the applicant banks, although a few of these are relatively close to each other.

Offices of the two applicant banks located in downtown Philadelphia at 17th and Arch Streets, and at 17th and Chestnut Streets are separated by three long blocks traversing Penn Center, an office redevelopment area. Within .3 of a mile from Provident's office are nine commercial banks, three savings banks, twelve savings and loan associations, five finance and small loan companies, and one credit union. Central-Penn's office is within .3 of a mile of six commercial banks, three savings banks, one savings and loan association, four finance and small loan companies, three credit unions, and two insurance companies.

Other branch offices of the applicants in downtown Philadelphia, which are located in the same area, are those at 7th and Chestnut Streets and at 4th and Chestnut Streets. All the major banks are represented in this section. Within .3 of a mile from Central-Penn's office located at 7th and Chestnut Streets are three commercial banks, a savings bank, three savings and loan associations, three finance and small loan companies, two credit unions, and nine insurance companies. Provident's office located at 4th and Chestnut Streets is within .3 of a mile of seven commercial banks, three savings and loan associations, one finance and small loan company, two credit unions, and one insurance company.

The office of Central-Penn, located at 2nd and Pine Streets, is seven blocks away, and separated by the Independence National Historical Park, from Provident's office located at 4th and Chestnut Streets. No competition exists between the two offices because of the distance, difference in neighborhood and the barrier created by the park. The draw area of the 2nd and Pine office is principally South Philadelphia rather than downtown Philadelphia. Within a mile from Central-Penn's office are three commercial banks, a savings and loan association, and one finance and small loan company.

In heavily populated West Philadelphia, Central-Penn's office at 58th Street and Baltimore Avenue and Provident's office at 19 South 52nd Street are 1.5 miles apart and thus have separate service areas. Within one mile of Central-Penn's office are three commercial banks, one savings and loan association, and two finance and small loan companies. Provident's office is within 1.3 miles of three commercial banks, two savings banks, five savings and loan associations, seven finance and small loan companies, four credit unions, and one insurance company.

In North Philadelphia, the office of Central-Penn at Broad Street and Glenwood Avenue and the office of Provident at 3314 Germantown Avenue are .7 of a mile apart and are separated by the main tracks of the Pennsylvania Railroad and by Allegheny Avenue, a major thoroughfare. Central-Penn's office serves the area south of these boundaries and is within .6 of a mile of two commercial banks, a savings bank, three savings and loan associations, four finance and small loan companies, and five credit unions. Provident's office, serving the business and population north of Allegheny Avenue and the railroad, is within .6 of a mile of four offices of two commercial banks, a savings bank, three savings and loan associations, and two finance and small loan companies.

Central-Penn's office at 5th and Wyoming Avenue and Provident's office at Broad and Louden Streets are a mile apart and serve different areas which are separated by the Northeast Expressway. The Wyoming office of Central-Penn does not serve the area along Broad Street which is within the service area of the Broad and Louden office of Provident. Likewise, the Provident's office does not serve the business along 5th Street south of Wyoming Avenue. Central-Penn's office is within one mile of three commercial banks, five savings and loan associations, five finance and small loan companies, and one credit union. Provident's office is less than .5 of a mile from one commercial bank, one savings bank, two savings and loan associations, four finance and small loan companies, and one credit union.

Central-Penn's office at 7325 Stenton Avenue and Provident's office at 78th Street and Ogontz Avenue are 1.75 miles apart. The road pattern of the area obviates competition between them. Central-Penn's office is within 1.5 miles of three commercial banks, two savings banks, and two savings and loan associations. Provident's office is within one mile of nine commercial banks, three savings banks, five savings and loan associations, one finance and small loan company, one credit union, and two insurance companies.

In Delaware County, the office of Central-Penn located at 301 Baltimore Pike, Springfield, and the office of Provident at Hart Lane and Saxer Avenue, Springfield, are approximately 1.2 miles apart. Within one mile from Central-Penn's office are four commercial banks, two savings and loan associations, two finance and small loan companies, and a savings bank. Provident's Springfield office is within 2.2 miles of six commercial banks, two savings banks, two savings and loan associations, four finance and small loan companies, and two credit unions.

In Montgomery County, the offices of Central-Penn located at King of Prussia Industrial Park, Upper Merion Township, and the office of Provident at King of Prussia Plaza, Upper Merion Township, are 1.2 miles apart. They are separated by the Pennsylvania Turnpike. Because of limited overpasses and underpasses, these offices are about 2.8 miles apart by either the eastern or western route. Driving this distance during rush hours can take from fifteen minutes to half an hour. Central-Penn's Industrial Park office cannot adequately serve the population drawn to the stores in the shopping center. Provident's office is within 1.75 miles of four commercial banks and two savings banks, and within .5 of a mile of a savings and loan association, and two finance and small loan companies.

In Bucks County there is no competition between the branches of the participating banks. While Provident has two offices in the upper part of the county and Central-Penn has eight in the lower part of the county, the closest offices are 18 road miles apart.

Thus it is evident that the overall competition among the branches of Provident and Central-Penn is not significant. It is pertinent, moreover, to note the kind of branching systems of other Philadelphia banks with which the merging banks must compete. Girard Trust, for example, presently has a total of 50 offices, which cover all sections of Philadelphia and its suburbs. According to Girard's 1965 annual report, "Close to two-thirds of all our deposits are now serviced at branch locations." It thus appears that Girard is handling a higher percentage of its deposits at its branches than is either Central-Penn or Provident.

Quite apart from a narrow consideration of the branching systems of the merging banks, the competitive structure is properly evaluated only when all the financial institutions which are competing for the savings and deposit dollars and the business, real estate, and personal loans are taken into consideration. It has already been shown that all of these financial institutions represent an impressive multiplicity of competitive units and resources. While figures are not available for the resources of all competing financial institutions, the figures that are available indicate that the pre-merger relative size of Provident is 3.93% of total financial institution resources and of Central-Penn is 2.09%. The post-merger relative size of the resulting bank will be 6.02%.[2] This post-merger relative size, while overstated because of lack of data from some competitors, will not cause, by any reasonable measure, a significant lessening of competition in the resulting bank's market.

This merger, on the contrary, will stimulate competition among the largest banks in the market area. As the Federal Reserve Board said in its decision on the Fidelity Philadelphia-Liberty Real Estate Bank merger in 1963, "the climate

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[2] These relative size figures are based on the aggregate resources figures of the following financial institutions: mutual savings banks, $2.861 billion; savings and loan associations, $2.555 billion; insurance companies, $3.847 billion; and commercial banks, $8.495 billion. Provident has total resources of $698.697 million and Central-Penn has resources of $370.379 million.

of competition would be stimulated by the increased capacity of a large scale bank, and the range of choices available to customers who require services which can only be rendered by a larger bank would be increased."

We have shown that the competition which would be eliminated by this merger is minuscule. It is now pertinent to examine the procompetitive effect of the merger on the convenience and needs of the Philadelphia market.

The increased lending capacity of the resulting bank will benefit large banking customers through the creation of an additional source of very large loans. The close relationship between competition and convenience and needs of the community is thus demonstrated. The needs of these large customers are better met through the injection of added competition in the large loan market.

The combining of the computer systems of the applicant banks will yield a more efficient data processing operation. Provident, at present, has new data processing equipment on order to replace its present obsolescent equipment. These new computers will adequately take care of business in the foreseeable future. Central-Penn's computers have no backup capacity; this merger will solve the problem of this vulnerability. A direct access system, now being put into service by Central-Penn will enable the resulting bank to provide direct access to its computers from customers sooner than Provident could on its own. With its greater financial resources and larger operations to assume acquisition and start-up costs, the resulting bank will be better able to provide the public with the latest advances in data processing services.

Use of the recently renovated Provident main office by the resulting bank will not only increase its efficiency but will improve customer service. Further, it will eliminate the necessity of a substantial outlay by Central-Penn to obtain adequate headquarters. To do so, according to Central-Penn's preliminary estimate, its annual occupancy costs would increase $250,000.

Since it has been shown that the branch systems of the merging banks are complementary, that an adequate number of alternative sources of financial services exist in the Philadelphia area and that competition among the large financial institutions will be stimulated, it is concluded that this merger, rather than having an overall adverse effect on competition, will have a favorable effect. Further, the increased ability of the resulting bank to serve the convenience and needs of the Philadelphia area by increased efficiency, by a greater lending capacity, through more adequate banking quarters, and by a generally improved quality of banking services makes this merger desirable. We would be hindering the economic growth of Philadelphia if we failed to give our approval to this merger application.

Pursuant to the 1966 Amendment to the Bank Merger Act, we find that the merger of Provident National Bank and Central-Penn National Bank clearly conforms to the statutory criteria and is in the public interest. The application is, therefore, approved.

James J. Saxon
Comptroller of the Currency

Dated: March 31, 1966

C. PROCEEDINGS BEFORE DISTRICT COURT

Docket Entries

1966

1 Apr. 1 Complaint filed

" 1 Summons exit

2 " 5 Answer filed

" 5 CASE LISTED FOR TRIAL.

" 6 Pre-Trial hearing in Chambers
Motion of Comptroller of Currency to intervene—Formal order to be entered

3 ". 6 Motion of the Comptroller of the currency to intervene as a party, filed.

3) " 7 Order of Court granting motion of Comptroller of the Currency for leave to intervene as a party, filed. 4-7-66 entered & counsel notified.

4 Apr. 13 Answer of Comptroller of Currency, filed.

5 " 20 Plaintiff's interrogatories to defendants filed

6 " 20 Plaintiff's motion for production of documents and affidavit in support thereof filed

7 " 20 Plaintiff's notice of motion for production of documents filed

8 " 20 Certificate of service filed

9 " 28 Transcript of testimony before Clary, J., 4/6/66 filed

10 May 6 Plaintiff's interrogatories to defendants (Set No. 2) filed

11 " 13 Defendants' objections to plaintiff's interrogatories (Set No. 2) filed

12 May	19	Objections of James J. Saxon, Comptroller of the Currency, to plaintiff's interrogatories (Set No. 2) and certificate of service filed
June	6	Hearing sur pre-trial order (Order to be entered)
13 "	7	Pre-trial order No. 1, Clary, Ch.J., filed 6/8/66 entered and copy to counsel
14 "	20	Transcript of pre-trial proceedings before Clary, Ch.J. filed
15 "	23	Summons returned "on 4/1/66 served" and filed
16 July	11	Plaintiff's pretrial brief filed
17 "	18	Plaintiff's pretrial brief filed
18 Aug.	9	Defendants' pretrial brief filed
19 "	9	Pretrial brief of the comptroller filed
20 "	9	Application of defendants to comptroller for approval to merge filed
21 "	9	Motion of intervenor comptroller to dismiss and notice of motion filed
22 "	10	Order fixing 8/31/66 at 10:30 a.m. for hearing re: motion to dismiss action, etc. filed 8/10/66 entered and copies mailed
23 "	22	Defendants' motion to dismiss filed
24 "	26	Brief of defendant banks in support of motions to dismiss filed by the intervenor and the defendants filed
25 "	26	Memorandum in support of intervenor's motion to dismiss filed
26 "	26	Plaintiff's brief in opposition to the comptroller's motion to dismiss filed

27 Aug. 26 Plaintiff's reply brief to the pre-trial briefs of the defendants and the comptroller filed

" 31 Hearing sur motion of intervenor to dismiss

28 Sept 6 Transcript of hearing 8-31-66, filed.

29 Sept 30 Plff's. motion for production filed.

30 " 30 Affidavit of John W. Neville in support thereof, filed.

31 " 30 Certificated of service by regular mail, filed.

32 Oct. 13 Plff's. interrogatories to deft. Banks filed.

33 " 13 Defts. answer to plff's. interrogatories filed.

34 " 13 Opinion Clary Ch. J. and Order that defendants' motion to dismiss and intervenor's motion to dismiss are DENIED and filed.

10-13-66 entered & notice mailed.

35 " 19 Deft'. Banks' motion for a protective order filed.

Oct. 26 Further pre-trial conference
The Court fixes Jan. 4, 1967 for trial and fixes Nov. 4, 1966 at 11 A.M. for hearing on discovery matters, etc.

36 Nov 1 Transcript of hearing 10-26-66 filed.

37 " 2 Comptroller's Brief on the weight to be ascribed the opinion of the regulatory Agency, filed.

38 " 2 Comptroller's Brief on the burden of pleading and proving convenience and needs, filed.

39 " 3 Plff's. memorandum in support of its Rule 34 motion for production of the Comptroller of the currency bank examiners reports, filed.

40 " 3 Memorandum of deft. Banks with respect to the weight to be given to the Comptroller's Approval, the burden of proof, and related matters, filed.

Nov. 4 Hearing re discovery motions

41 " 7 Transcript of hearing 11-4-66, filed.

Nov. 9 Discovery hearing resumed and concluded

42 " 21 Transcript of hearing on plff's. motion for production under rule 34, filed.

43 " 22 Opinion Clary, Ch. J., re: ruling on plff's. motion for production of documents under rule 34, filed.

11/23/66 entered and copies mailed.

44 " 30 Plff's. identification of witnesses, summary of evidence and statement of position, filed.

45 Dec. 2 Defendant Banks' motion for final judgment, notice thereof and exhibits in support thereof, filed.

46 " 6 Motion of intervenor for final judgment and notice thereof, filed.

Dec. 12 Conference in Chambers

47 " 14 Deft. Banks' list of prospective witnesses, filed.

48 " 14 Intervenor's list of witnesses, filed.

49 " 20 Transcript of hearing in chambers 12/14/1966, filed.

50 Dec. 27 Intervenor's memorandum of law in opposition to plaintiff's motion for production of documents, filed.

51 " 29 Opinion, Clary, Ch. J. and Order DISMISSING the complaint with prejudice; the statutory stay of the merger is LIFTED and the banks may merge at a time to be determined by them, but not earlier than January 18, 1967, filed. 12-29-66 entered & notice mailed

1967

52 Jan. 10 Order that the Clerk of this Court turnover the entire record to a representative of the Attorney General of the U.S. for the purpose of having record lodged with the Clerk of the Supreme Court of the United States etc., filed.

1-10-67 entered & notice mailed

51½ " 10 Plff's. notice of appeal to the Supreme Court of the United States filed.

PRE-TRIAL ORDER NO. 1 OF DISTRICT COURT.

A pre-trial conference having been held on June 6, 1966, and counsel having been heard, and due deliberation having been had, it is ORDERED in the above action that:

1. Plaintiff shall file on or before July 8, 1966 a detailed written brief containing separately numbered paragraphs and setting forth:

(a) The facts which plaintiff expects to prove in support of each claim for relief, distinguishing between those facts which plaintiff contends, on the basis of the answers, answers to interrogatories, or otherwise, are admitted and those which are contested;

(b) The legal issues, contentions and supporting authorities relating to each claim for relief, including plaintiff's contentions as to the parties bearing the proof on each issue.

2. Defendants shall file on or before August 5, 1966 a detailed written brief containing separately numbered paragraphs and setting forth:

(a) The facts which defendants expect to prove in defense of each claim for relief, distinguishing between those facts which defendants contend, on the basis of the complaint, answers to interrogatories, plaintiff's brief or otherwise, are admitted and those which are contested;

(b) The legal issues, contentions, and supporting authorities relating to the defense of each claim for relief, including defendants' contentions as to the parties bearing the burden of proof on each issue.

3. Plaintiff shall file on or before August 25, 1966 a detailed written reply-brief containing separately numbered paragraphs and setting forth:

(a) The facts, if any, which plaintiff expects to prove in rebutting any affirmative matter raised by defendants in briefs filed pursuant to paragraph 2 hereof, distinguishing between those facts which plaintiff contends on the basis of the answers to interrogatories, defendants' briefs or otherwise, are admitted and those which are contested;

(b) The legal issues, contentions, and supporting authorities, if any, related to the rebuttal of any affirmative matter raised by the defendants in a brief filed pursuant to paragraph 2 hereof, including plaintiff's contentions as to the parties bearing the burden of proof on each issue.

4. Any factual issue, legal issue, contention, claim, or defense, not set forth in detail as provided in paragraphs 1, 2 and 3 shall be deemed abandoned, uncontroverted, or withdrawn in further proceedings, the pleadings and other papers on file herein to the contrary notwithstanding, but provided that nothing in this Order shall preclude any party from raising forthwith, by a supplemental brief, any issue, factual or legal, disclosed by any discovery taken after the filing of the pre-trial briefs, subject to the discretion of the Court.

BY THE COURT:

Thomas J. Clary
Ch. J.

Dated:
June 7, 1966

PRE-TRIAL BRIEF OF DEFENDANT BANKS.

I. INTRODUCTION

1.1 The Government in its pretrial brief takes the position that this case "is *United States v. Philadelphia National* all over again, only that the names have been changed" (Par. 117). The Government ignores all that has happened since *Philadelphia National.* It ignores the enactment of the Bank Merger Act of 1966 designed to overrule a crucial holding of the Supreme Court in that case. It ignores the vast differences between this merger—which joins the two smallest reserve city banks in Philadelphia to form the fourth largest—and the merger under consideration in *Philadelphia National*—which would have combined the second and third banks to produce the largest bank in the City, half again as big as its nearest competitor. Because of the difference between the Government's approach and the defendant Banks' approach to the case, the Banks have felt it necessary in this brief to set forth their position affirmatively rather than merely to answer the Government's brief point by point. Exhibit A to this brief shows where the answers to the Government's principal points will be found in this brief and sets forth additional responses by the Banks.

1.2 This proceeding is not a routine antitrust case. It is governed, not by the Clayton Act, but by the Bank Merger Act of 1966, 80 Stat. 7. The Bank Merger Act of 1966 amends Section 18(c) of the Federal Deposit Insurance Act, 12 U.S.C. §1828(c) to provide that:

> (a) No insured bank [1] shall merge with any other insured bank except with the approval of the responsible regulatory agency (in this case the Comptroller of the Currency) (Subsection 2).

1. "Insured banks" include all commercial and savings banks insured by the FDIC, 12 U. S. C. § 1813(h).

(b) In deciding whether to approve a merger application, the Comptroller shall take into consideration in every case the financial and managerial resources and future prospects of the existing and proposed institutions and the convenience and needs of the community to be served (Subsection 5).

(c) The Comptroller shall also obtain advisory reports from the other banking agencies and the Attorney General as to the competitive factors involved in the proposed merger (Subsection 4).

(d) The Comptroller shall not approve a merger whose effect in any section of the country may be substantially to lessen competition unless he finds that the anticompetitive effects are clearly outweighed in the public interest by the probable effects of the transaction in meeting the convenience and needs of the community to be served (Subsection 5.)

(e) The Comptroller must notify the Attorney General of any approval of a bank merger under the Act, and the Attorney General has 30 days in which to bring an action under the antitrust laws. The commencement of such action automatically stays the effectiveness of the Comptroller's approval (Subsections 6 and 7).

(f) In any action brought by the Attorney General, the Comptroller may appear as a party and as of right (Subsection 7(D)).

(g) The court is directed to "review de novo the issues presented" and to apply the "identical" standards which the Comptroller was directed to apply in issuing the initial approval (Subsections 7(A) and (B)).

1.3 In the instant case the Comptroller found that the competition which would be eliminated by the merger of Provident and Central-Penn is "miniscule" and that very

substantial benefits to the community are to be expected from the merger. He concluded that the merger clearly conforms to the statutory criteria and is in the public interest. Accordingly, he approved the application.[2] The Banks are filing with this brief an Appendix containing the Comptroller's decision, the advisory reports on competitive factors by the Federal Reserve Board and the Attorney General, and certain statutory provisions and statistics as to commercial banks in Philadelphia and nearby counties and communities.

1.4 The task of this Court under the Bank Merger Act of 1966 is to "review" the decision of the Comptroller of the Currency. It hears the evidence "de novo" (unavoidably since there was no hearing held before the Comptroller), but the judgment it must make is whether the Comptroller acted within the bounds of the di retion entrusted to him by the Bank Merger Act of 1966, not whether the Court approves of the merger and not whether the merger would violate Section 7 of the Clayton Act. In no other way can the Act be construed constitutionally since administrative determinations regarding the community needs for improved banking services and the effects of the merger in meeting these needs do not present a case or controversy within the judicial power under the Constitution. In no other way can the Bank Merger Act of 1966 be construed consistently with Congress' reiterated intent to vest authority in the bank regulating agencies to authorize mergers consistent with the public interest where public interest considerations clearly outweigh any visible impairment of competition.

1.5 The purpose of the Bank Merger Act of 1966 was to change a crucial holding of the Supreme Court in *Phila-*

2. The application was filed December 3, 1965. A copy thereof was supplied to the Attorney General shortly after filing. Since the application is in the nature of the record before the Comptroller, an additional copy is being filed with the Court concurrently with the filing of this brief.

delphia National, i.e., the Supreme Court's holding that Philadelphia's need for a larger bank "to bring business to the area and stimulate its economic development" was irrelevant. On this point the Supreme Court said:

> "We are clear, however, that a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended §7. Congress determined to preserve our traditionally competitive economy. It therefore prescribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid." 374 U.S. 321, 371.

This holding by the Supreme Court made a nullity of the bank regulatory agency's finding that the merger was in the public interest. The Bank Merger Act of 1966 was intended to reverse this result and to require the courts to consider the public interest just as the regulatory agencies are required to do. Perhaps the best indication of this intent is Section 3 of the Bank Merger Act of 1966, which permits Philadelphia National and Girard to reinstitute their merger application and have it acted upon in accordance with the provisions of the new Act.

1.6 The public interest which both the regulatory agencies and the Courts are required to take into account is "the convenience and needs of the community to be served." This standard is in no way unique. The concept of public convenience and necessity forms the universal basis for the regulation of industries affected with a public interest.

II. THE LEGAL ISSUES

2.1 *Controlling Statute.* The first legal issue is posed by the preceding section of this brief, namely, is this case controlled by Section 7 of the Clayton Act (as the Government contends)? Or is the case controlled by the Bank Merger Act of 1966 (as the Banks contend)? The answer is found in the Bank Merger Act, which says:

> "In any judical proceeding attacking a merger transaction approved under paragraph (5) on the ground that the merger transaction alone and of itself constituted a violation of any antitrust laws other than Section 2 [of the Sherman Act], *the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5)* [of the Bank Merger Act of 1966]." (emphasis supplied)

2.2 The reason why Congress directed the court to apply identically the same standards as the Comptroller is to be found in the history of Congress' efforts to regulate bank mergers.

(a) Before the Bank Merger Act of 1960, 74 Stat. 129 (1960), there were very serious gaps in the power of federal banking agencies to regulate bank mergers; and even where the power existed, the standards governing administrative discretion were not clearly spelled out. Congress passed the 1960 Act:

> "to provide for control of all mergers by asset acquisition by banks under the jurisdiction of the Federal banking agencies, under uniform and clear standards calling explicitly for consideration of both banking factors and competitive factors, but without giving sole and controlling effect to any single factor," Senate Report No. 196, 89th Cong., 1st Sess. 1 (1959).

Congress had in mind Section 5 of the Interstate Commerce Act, which permits the merger of carriers if the

Commission finds that the proposed transaction will be consistent with the public interest and will not unduly restrain competition.[3]

(b) Following passage of the Bank Merger Act of 1960, the Supreme Court's decision in *Philadelphia National* established that the Federal banking agencies did not have exclusive jurisdiction over bank mergers; that bank mergers were subject to the Clayton Act; and that, in Clayton Act suits, the courts were to consider only competitive factors and were not required, or indeed permitted, to take into account the banking factors relating to public convenience.

(c) In the Bank Merger Act of 1966 Congress accepted the Supreme Court's decision that the decisions of Federal banking agencies approving bank mergers should be subject to review by the courts, but added the requirement that in such review the court must apply the same standards as the banking agencies, which include consideration of the banking factors of public convenience "in every case."

Congress made it clear that, as between the competitive factors and the public interest banking factors, public interest is to be overriding. At the same time Congress emphasized the importance of maintaining competition by providing that mergers which would have a substantial anticompetitive effect are not to be approved unless the public interest is clearly of greater weight.

2.3 *Review de novo.* The second legal issue is also posed by the preceding section of this brief, namely, is this Court to make an examination of the merger as if it were being done for the first time and come to its own conclu-

3. Senate Report No. 196, 89th Cong., 1st Sess. 4 (1959). The report cites *McLean Trucking Co. v. U. S.*, 321 U. S. 67 (1944); in which the Supreme Court compared the two standards of public interest and undue restraint on competition.

sions independently of the Comptroller and "free of presumptions traceable to anyone" (as the Government contends in paragraphs 80-86 of its pretrial brief)? Or is the Court required to uphold the Comptroller's decision if that decision is within the bounds of reasonable administrative discretion (as the Banks contend)? The Banks submit that the Bank Merger Act's direction that "the court shall review de novo the issues presented" should be given the same meaning as Section 10 of the Administrative Procedure Act, 5 U.S.C. §1009.[4] Under Subsection (e) of that Section, the court could hold unlawful or set aside the Comptroller's action, findings and conclusions only if the court found them to be

> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

2.4 *First National Bank of Smithfield, North Carolina v. Saxon*, 352 F.2d 267 (4th Cir. 1965), is an example of a review de novo in which the standards of the Administrative Procedure Act were followed. The *Smithfield* case was a suit for declaratory judgment attacking the Comptroller's approval of a branch application. The District Court held that the Comptroller's approval was invalid on its face because it had been issued without a hearing (232 F. Supp. 725 (1964)). The Circuit Court held that the Comptroller was not required to grant a hearing, but that his approval was nevertheless subject to judicial review under the Administrative Procedure Act. It returned the proceedings

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4. The fact that the proceeding is in the form of an action for an injunction rather than a petition for review is immaterial. Section 10 of the Administrative Procedure Act provides that, in the absence of any special statutory review proceeding, the form of proceeding for judicial review shall be "any applicable form of legal action including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction" (Subsection (b)).

to the District Court for a trial de novo on the facts, but held that if "after the Court has made its fact findings, it then appears that the decision of the Comptroller is dependent upon an exercise of discretion, the Court cannot substitute its discretion for the Comptroller's. However, it can set aside such a determination if, in the light of the facts found by the court, it concludes that the Comptroller has abused, exceeded or arbitrarily applied his discretion" (352 F.2d 272). The Court of Appeals characterized this procedure as a "review de novo" of the action of the Comptroller (352 F.2d 273).[5]

2.5 If the review provisions of the Bank Merger Act of 1966 were interpreted as the Government contends they should be—i.e., to authorize the Court to make an independent decision as to whether the public interest in the merger outweighs any anticompetitive effect, the Act would violate the constitutional separation of powers.

> "If the function performed by an agency is 'administrative' or 'legislative' and if a federal court is required to do all over again what the agency has done, the system of review violates Article III of the Constitution" Davis, Administrative Law Treatise, 1958, Vol. 4, p. 180, §29.10.

The maximum scope of judicial review under the Constitution in a situation such as this was defined in two Supreme Court decisions under the Radio Act of 1927, *Federal Radio Commission v. General Electric Co.*, 281 U.S. 464 (1930), and *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266 (1933). The Radio Act authorized the Radio Commission to grant and renew station licenses "where public convenience, interest or necessity will be served thereby" and provided for appeal to the

5. The Smithfield case was decided during the legislative hearings on the Bank Merger Act of 1966 and may well be the source of the phrase "review de novo" as distinguished from the more usual phrase "trial de novo."

Court of Appeals of the District of Columbia. When *General Electric* was decided, the appeal provision (Section 16) permitted the Court of Appeals to "alter or revise the decision appealed from and enter such judgment as to it may seem just." In *General Electric,* the Court of Appeals had exercised this power to change the provisions of an order entered by the Radio Commission, and the Commission sought review by the Supreme Court. The Supreme Court held that the proceeding before the Court of Appeals "was not a case or controversy in the sense of the judiciary article, but was an administrative proceeding, and therefore that the decision therein is not reviewable by this Court" (281 U.S. 470).[6] The subsequent developments are described in *Nelson Brothers,* another appeal from an order of the Court of Appeals of the District of Columbia reversing a decision of the Radio Commission:

> "In the light of the decision in the *General Electric* case, *supra,* the Congress, by the Act of July 1, 1930, c.788, amended §16 of the Radio Act of 1927 so as to limit the review by the Court of Appeals. [citation omitted] That review is now expressly limited to 'questions of law' and it is provided 'that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary or capricious.' This limitation is in sharp contrast with the previous grant of authority. *No longer is the Court entitled to revise the Commission's decision and to enter such judgment as the Court may think just.* The limitation manifestly demands judicial, as distinguished from administrative, review." (289 U.S. 275-6) (emphasis supplied)

6. The Court of Appeals of the District of Columbia was considered to be a legislative court and therefore not restricted to the constitutional jurisdiction over cases and controversies (281 U. S. 468).

The Supreme Court recognized the limits of permissible review in *Philadelphia National*, where, speaking of "an ultimate reckoning of social or economic debits and credits," it said:

> "A value choice of such magnitude is beyond the ordinary limits of judicial competence . . ." (374 U.S. 371).

2.6 *Burden of Proof*. The third legal issue is the burden of proof on the question of community convenience and needs. The normal rule is that the plaintiff must prove his case. The Government contends that its case does not include proof as to community convenience and needs because the question of convenience and needs "enters into the picture as an exception to the antitrust laws" (paragraphs 74-79 of the Government's pretrial brief). The short answer is that under the Bank Merger Act of 1966 the consideration of convenience and needs is not an exception; community convenience and need is a basic factor which the Act requires the Comptroller to take into account "in every case." In this case the Comptroller concluded that the merger of Provident and Central-Penn is in the public interest after taking into account the effect on competition and the improved quality of banking services which will result. If the Government is to upset the Comptroller's conclusion, the Government has the burden of showing wherein the Comptroller acted arbitrarily or capriciously or wherein he exceeded his discretion in striking a balance between competition and public interest. It cannot discharge this burden by a showing directed solely at the competition side of the scale. If it is to succeed in this case, the Government must evaluate the weights on *both* sides of the scale, public interest as well as competition, and in addition it must demonstrate that the Comptroller's evaluation is arbitrary, capricious, or unreasonable.

2.7 The quotations from various Congressmen set forth in paragraphs 76 through 79 of the Government's

pretrial brief—while they speak of the "burden" on the merging banks and the Comptroller—are not directed at the specific legal issue of burden of proof. The Congressmen were not concerned with the niceties of trial procedure. Their concern was with the standard to be followed by the Comptroller in passing on bank merger applications and by the courts in reviewing the Comptroller's action. The Congressmen quoted by the Government are individuals who would have preferred no Bank Merger Act of 1966. In the face of Congressional pressure for an act which would permit bank mergers in the public interest, these legislators fell back to the position of emphasizing the importance of maintaining competition. That is all their statements amount to.

2.8 *Market Share and Concentration Statistics.* The fourth legal issue foreshadowed by the Government's pretrial brief is whether the Government can, as it apparently intends, prove its case on competition by statistics as to the number of banks with headquarters in the area; mergers among these banks (including mergers involving the defendant Banks); and the percentages of deposits, offices, assets and loans held by the five largest banks and by the defendant Banks (par. 111-116, 122, 125-128). In thus basing its case on statistics, the Government is following the path marked out in *Philadelphia National*, where the Supreme Court disregarded this Court's qualitative findings as to competition and relied instead on market share and market concentration figures. However, the Government overlooks the difference in the relative positions of the banks in *Philadelphia National* and in the instant case. In *Philadelphia National* the Supreme Court at the outset noted that "the resulting bank would be the largest in the four-county area, with (approximately) 36% of the area banks' total assets, 36% of deposits and 34% of net loans. It and the second largest (First Pennsylvania Bank and Trust Company, now the largest) would have between them 59% of the total assets, 58% of deposits, and 58% of the

net loans, while after the merger the four largest banks in the area would have 78% of total assets, 77% of deposits, and 78% of net loans" (374 U.S. 331). Under these circumstances the Supreme Court felt that it was possible "to simplify the test of illegality" (374 U.S. 362). It held that "a merger which produces a firm controlling an *undue* percentage share of the relevant market, *and* results in a *significant* increase in the concentration of firms in that market, is so *inherently* likely to lessen competition substantially that it must be enjoined . . ." (374 U.S. 363, emphasis supplied). But in the next sentence the Court was careful to point out that this simplified test applied "*only* with respect to mergers whose size makes them inherently suspect in light of Congress' design in §7 to prevent *undue* concentration" (374 U.S. 363, emphasis supplied). In the instant case the merged bank will not control an "undue" share of the market; the increase in concentration will not be "significant"; and the size of this merger does not make it "inherently suspect." Also, Congress' design in the Bank Merger Act of 1966 was different than in §7 of the Clayton Act. The Banks contend that this is not a case for a simplified, quantitative test, but rather a case for a qualitative examination of effects on competition, including beneficial effects as well as any adverse effects.[7] To use the much quoted words of the Supreme Court in *United States v. Brown Shoe Co.*, 370 U.S. 294, 322, fn. 38, "only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger."

2.9 *Section of the Country.* The fifth legal issue involves the section of the country in which the effects of the merger are to be measured. In this case the Government has selected the Philadelphia four-county area and has

7. The Comptroller has pointed out (page 17 of his opinion) that there is a close relationship between competition and convenience and needs.

assumed the burden of proving the effect on competition within that area. The Banks contend that the Government cannot sustain its burden of proof with respect to the area it has chosen—particularly insofar as it confines its proof to market shares and concentration—for two reasons: First (as described later in this brief), the figures as to market shares and concentration do not reflect competition from other financial institutions; Second, as this Court found in its decision in *Philadelphia National*, the four-county area is not a natural market in which market shares and concentration can be measured.[8] Rather, the four-county area is an arbitrary section of a much larger market, which also comprises a number of smaller markets. Thus:

(a) No bank competes only in the four-county area. The six reserve city banks in Philadelphia with offices in all four counties derive very substantial business from outside the area. For example, the *Philadelphia National* opinion shows that Philadelphia National and Girard obtained 46% and 37%, respectively, of their commercial and industrial loans from outside the four counties (374 U.S. 359, fn. 36). Provident and Central-Penn obtain, respectively, about 42% and 17% of their loans from outside the area.

(b) Commercial banks in New York, Pittsburgh and other financial centers compete for the business of large customers in the four-county area. Savings institutions across the country compete for the savings of individuals.

(c) Important competitors of the defendant Banks have branches outside the four-county area. Both Continental Bank and Trust Company (with resources of $376,000,000) and Industrial Valley Bank and Trust

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8. The Supreme Court recognized as much in *Philadelphia National*, when it arbitrarily reduced the apparent share of the merged bank by 16⅔% (from 36% to 30%) (374 U.S. 364).

Company (with resources of $196,000,000) have branches in Chester County and are permitted to branch into Berks and Lehigh Counties as well.

(d) Banks in Camden, Trenton, Burlington and Wilmington can and do compete for the business of commuters between those communities and Philadelphia, Bucks, Montgomery and Delaware Counties and for the business of residents and businesses in the adjacent portions of those counties.

(e) Banks in Chester, Berks, Lehigh and Northampton Counties can branch into portions of the four-county area.

(f) Certain services offered by the reserve city banks are particularly directed at other banks and customers outside the metropolitan area, examples being correspondent bank services, corporate fiduciary services, and international services. In all these cases the customer in the country particularly desires representation in the city. The importance of these services can be gauged by the published reports of First Pennsylvania which show correspondent bank balances in the order of $200,000,000.

The Appendix which the Banks are filing with this brief contains a memorandum showing the banks operating offices in the four-county area and banks permitted by statute to branch into the area.[9] The complexity of this pattern

9. Despite the inference drawn by the Supreme Court in the *Philadelphia National* case (374 U. S. 361), the branching limitations in Pennsylvania law are not intended to define "a meaningful banking community." They are intended rather to protect country banks from competition by banks in larger communities. Thus, the branching laws are a restriction on the ability of Provident and Central-Penn to develop and compete, and this restriction is a major justification for the merger. The restrictive effect of the Pennsylvania branching laws is compounded by the fact that the Philadelphia-Camden metropolitan area is bisected by state lines, which present further limitations on the ability of Philadelphia banks to achieve a size commensurate with the needs of the metropolitan area.

makes the Government's figures as to market shares and concentration meaningless.

2.10 *Competition.* The sixth legal issue is whether the Comptroller was correct in measuring the effect of the merger not only in respect of competition among commercial banks but also in respect of competition between commercial banks and other financial institutions. His opinion (page 8) analyzes competition with mutual savings banks, insured savings and loan associations (including those as far away as California), insurance companies, credit unions, finance companies, small loan and consumer discount companies, and factoring companies. The Government chooses to ignore this competition and cites as its justification the concept of "line of commerce," even though the words "line of commerce" do not appear in the Bank Merger Act of 1966. The Government's convenient solution is to suggest that "clearly it was the intention of the drafters to include" the missing expression (par. 99). This suggestion is wholly gratuitous. The fact that the drafters of the Bank Merger Act of 1966 followed the Clayton Act in the phrases "any section of the country" and "may be substantially to lessen competition" compels the conclusion that their failure to follow the Clayton Act in the further phrase "line of commerce" was deliberate: *Lichten v. Eastern Airlines, Inc.*, 189 F. 2d 939, 941 (2d Cir. 1951).[10]

10. Senator Robertson, Chairman of the Senate Committee on Banking and Currency, in his explanation of the bill to the Senate, said: "The text of paragraph (B) of the new bill follows the terms of section 1 of the Sherman Act and section 7 of the Clayton Act, with the exception that the reference to 'any line of commerce' in the Clayton Act is not carried over into the new bill. In this respect the new bill resembles the Bank Merger Act of 1960, and calls for an appraisal of the overall effects of the merger on competition, weighing increases of competition in one field against decreases in competition in another field. The banking agencies and the courts, in other words, are not intended and are not permitted to select some single, perhaps minor aspect of the banks' business and to say that, because there is some lessening of competition in this element of the business, the overall effects of the merger—the increase of competition

2.11 The Government's purpose in arguing "line of commerce" is similar to its purpose in choosing a restricted section of the country; namely, to impute validity to the Government's figures as to concentration and market shares. Since its statistics relate only to commercial banks, the Government would like to confine the case to these institutions and thus avoid the much more complex task of assessing the competitive effect of this merger in the financial market in which the banks compete. The Government's statistics as to deposits and loans of commercial banks are meaningless because in each category they leave out of account large segments of competition. Thus:

(a) In seeking deposits, commercial banks compete with savings banks, savings and loan associations, sellers of United States Treasury Bills, Federal Agency Securities, commercial paper, and other short term investments.[11]

(b) In seeking loans, commercial banks encounter competition from finance companies, insurance companies, savings banks, savings and loan associations, credit unions, and credit provided by suppliers of goods and equipment.[12]

The Government's statistics, in ignoring this competition from other financial institutions both inside and outside the four-county area, grossly overstate the competitive signifi-

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in the entire field of banking and in the broader field of financial institutions which may result from other aspects of the merger—are irrelevant and may not be considered." (Cong. Rec., 89th Cong., 2nd Sess., p. 2541, February 9, 1966)

11. Since 1955 time deposits of Third Federal Reserve District member banks have increased 156%. Whereas time deposits were 27.4% of total deposits in 1955, they were 45% of total deposits in 1965.

12. Bank portfolios today have a much smaller percentage of short term self-liquidating loans than was the case even five years ago. Largely in response to customer demand, banks are increasing their volume of term loans and thus competing more directly with finance and insurance companies and other term lenders.

cance of this merger. The Banks contend that the Comptroller was correct in analyzing the competition from other financial institutions and that the Government is wrong in omitting to do so.

2.12 The legislative history contains many statements recognizing the importance of competition between commercial banks and other financial institutions. The House Report for the first Bill (S. 1698) reported out of the House Committee on Banking and Currency said:

> "In making this review, your committee expects the banking agencies, the Department of Justice, and the courts to give full consideration to all aspects of the public interest, and take into consideration all elements of competition and all elements entering into the convenience and needs of those who are to be served by the resulting bank. The committee recognized that commercial banks face intensive competition from other financial institutions—savings and loan associations, mutual savings banks, insurance companies, finance companies, and so forth. The committee also recognized that competition between commercial banks, and between commercial banks and other institutions, includes local competition, regional competition, national competition, and even international competition for one part or another of their business. To overlook any of these aspects of competition, or to concentrate on one of them to the exclusion of the others, would be unrealistic and might well diminish, not increase, financial competition."

The House Report on the Bill (H.R. 12173) as finally enacted said:

> "The banking agencies and the Department of Justice are united in the expression of their ultimate goals, which are the maintenance of a sound banking system and the promotion of *healthy competition*

among financial institutions to the end that the needs of a growing economy and the individuals and business units which make it up shall be adequately served. Needless to say, the attainment of these objectives is also the primary concern of your committee in recommending for enactment the bill reported herewith." (emphasis added)

Senator Robertson pointed out during Senate debate on the Bill in its final form:

"Furthermore, the business of banking is not a simple or limited activity. On the contrary, commercial banking consists of many different activities, and there are competitors in other fields for each of these activities.

"For personal demand or time deposits, banks compete with savings banks, savings and loan associations, and credit unions. This is real and fierce competition, as can easily be seen from the various trade publications and the newspaper advertisements which have followed the recent increase in the ceilings on interest rates in savings accounts in commercial and savings banks.

"For consumer loans and home mortgages, commercial banks must compete with finance and insurance companies, in addition to savings banks, savings and loans, and credit unions.

"Commercial banks must compete for deposits from and loans to business firms, with insurance companies, factors, savings banks, and savings and loans, and even with the U.S. Government—both as issuer of bills and notes which corporate treasurers now find attractive in large quantities, and as issuers of vast quantities of FNMA, EXIM, and SBA, Home Loan Bank and other obligations or participations.

"And in most of the other services commercial banks provide, they meet with other competition. Trust services are also provided by individual lawyers, as every lawyer in the Senate knows, or by professional trustees, about whom our friends from Boston can tell us.

"Furthermore, even in the field of commercial banking there are many varieties and kinds of competition. As the House report on the bill points out, the nationwide competition of automobile companies is quite different from the local competition of laundries. So also, competition between the 37 different billion-dollar banks in 14 different cities for the million-dollar deposits and loans of the great nationwide steel, aluminum, and chemical companies is very different from the competition of the local banks and savings and loan associations for an individual $20,000 home mortgage or the competition of local banks, credit unions, and automobile dealers for a $2,500 loan on a new automobile.

"The small banks, the credit unions, and the small savings and loan associations are apt to compete only for the small local deposits and loans—the big banks compete with the big insurance companies and commercial factors and with each other for the nationwide business. They also compete with the small organizations for the local business. Each bank is surrounded by a series of concentric circles. The smallest one represents the area of competition for small deposits and small loans. A larger ring represents the area of competition for medium loans, and so on. The whole world is the area of competition for the biggest loans.

"Any estimate of the competitive nature of the banking business in the broad and meaningful sense of the terms, and of the opposite—the degree of monopoly—must be based on the realities of the business of

banks and of the other closely related institutions which make up the financial world." (Cong. Rec., 89th Cong., 2nd Sess, p. 2541, February 9, 1966)

2.13 The intent of the Bank Merger Act of 1966 is clear. The courts are to take a new, fresh look at bank mergers in the light of the fact that banking is regulated in the public interest. In so doing, the courts can and should follow the precedents established in the application of merger statutes to other regulated industries—which consider competition from sources outside the industry as well as those within. An example is the per curiam decision of the Supreme Court in *Seaboard Air Line Railroad Co. v. U.S.*, 382 U.S. 154 (1965). That case involved the merger of two railroads to produce lower costs and improved service and to eliminate duplication of facilities. The Department of Justice opposed the merger because it would tend to create a rail monopoly. The Interstate Commerce Commission, while recognizing that a monopoly would be created, nevertheless approved the merger, noting that the need to preserve competition among railroads had diminished because the railroads were losing traffic to truck, water and other modes of competition. The Supreme Court held that it was not necessary for the Commission to determine whether or not there was a technical violation of the Clayton Act. The Commission's task was to appraise the effects of the curtailment of competition along with the advantages of improved service to determine whether the merger would effectuate the overall transportation policy. The Court said: "It matters not that the merger might otherwise violate the antitrust laws; the Commission has been authorized by Congress to approve the merger of railroads if it makes adequate findings in accordance with the criteria quoted above that such a merger would be 'consistent with the public interest' " (382 U.S. 156).

2.14 In taking this position as to competition from other financial institutions, the Banks are not disregarding

the finding of this Court in *Philadelphia National* that commercial banking is a separate line of commerce. This Court's finding was made in rejecting the then contention of the Government (and the banks that were defendants in that case) that commercial banking should be subdivided into various product lines (201 F. Supp. 361). This Court recognized that banks face competition from other institutions but did not consider that such competition justified a fragmented approach under the Clayton Act (p. 362-3). The Banks are not asking the Court to reverse that position in this case. They are arguing that under the Bank Merger Act of 1966 the competition from other financial institutions (which no one denies is real and important) should be taken into account and that the existence of this competition from other institutions invalidates statistics which do not include the other institutions.

III. FACTS

A. Introduction

3.1 The merger of Provident and Central-Penn must be viewed in the light of the modern evolution of banking. Such banking developments as magnetic imprinting of checks, computerized transit operations, intercity night truck runs, and the national "bank wire" service have reduced collection periods between distant cities so that, in many cases, funds deposited in a major bank in New York are available in Philadelphia the next day, and vice versa. Without such developments, the amount of demand deposits required to transact the nation's business would be several times larger,[13] and the cost of processing the current national volume of 12-14 billion checks a year would be prohibitive. In addition, improvements in communication and transportation tend to make the money market more

13. Demand deposits in Philadelphia and other major financial centers (excluding New York) currently turn over about 50 times a year—almost twice the annual rate in 1955.

national and even international. Philadelphia is part of a developing megalopolis stretching from Boston to Washington and interconnected by high speed rail service. European banking centers are less than a half day's journey by plane from major cities in the United States. Foreign banks have numerous offices and agencies in this country. Larger banks in this country are increasing their offices and investments abroad. First National City Bank of New York owns a Canadian bank. Mellon National Bank and Trust Company of Pittsburgh has invested $15 million in a British bank.[14] The Bank of America is issuing credit cards which can be used nationally and internationally and can ultimately be meshed with checking accounts to provide unified financial service. Against this background, the Comptroller was clearly right in holding that the merger of Provident and Central-Penn can have no significant adverse effect on competition, but to the contrary will improve the quality of banking service and assist the economic growth of Philadelphia. Larger banking units are needed in the modern financial world. Their services benefit small customers as well as large. Indeed, the smaller customer may have greater need for the specialized services provided by larger banks because he lacks the resources to provide the services for himself.

3.2 The Comptroller was also correct in holding that the merger will stimulate competition with the larger banks in Philadelphia and elsewhere. Central-Penn is the smallest reserve city bank in Philadelphia, less than one-quarter as big as the leading bank (First Pennsylvania). Provident is the next smallest, less than half as big as First Pennsylvania. Because of the disparity in size—and for other reasons set forth later in this brief—Provident and Central-Penn

14. Such investments are made through subsidiaries organized under the Edge Act, 12 U. S. C. § 611, et seq. Provident's Edge Act subsidiary is limited to an investment of about $300,000 in any foreign bank without specific approval of the Federal Reserve Board. Central-Penn does not have an Edge Act subsidiary.

are at a disadvantage in competing with their larger rivals. As stated by the Government in its suit to enjoin the merger of Continental Illinois National Bank and Trust Company and City National Bank and Trust Company (U.S. District Court for the Northern District of Illinois, Civil Action No. 61-C-1441):[15]

> "Banking institutions the size of the defendants [combined assets of $3.2 billion] have tremendous competitive advantages simply by virtue of the large economic power they possess, their 'public image' of size and their consequent superior ability to attract more business and larger customers. They also enjoy a greater ability to raise capital, finance expansion and undertake advertising and promotional programs the cost of which would exceed the more limited resources of their smaller rivals.
>
> "In addition they are in a better position because of their size to carry out programs of customer solicitation, and to attract more influential people to their boards of directors. Because of their larger capital and surplus, they also possess lending limits exceeding those of their smaller rivals, and are thus able to attract customers with larger credit needs."

That quotation aptly describes the competitive advantages enjoyed by the two leading Philadelphia banks (The First Pennsylvania Banking and Trust Company and The Philadelphia National Bank) by reason of the fact that they are very substantially larger than their rivals. The merged bank will be about two-thirds the size of First Pennsylvania

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15. This merger combined the second and the sixth largest banks in Chicago to form the largest bank in that city and the ninth largest in the United States. Under Section 2(a) of the Bank Merger Act of 1966 it is "conclusively presumed not to have been in violation" of the Clayton Act. The quotation is from the Government's Introductory and Summary Pretrial Brief, p. 10.

and three-quarters the size of PNB. It will be in a position to compete on more nearly equal terms with those two leaders. The advisory report of the Federal Reserve Board on the question of competition summed up the pro-competitive effects of the merger as follows (p. 9):

> "Currently, Provident is the fifth largest bank in the Philadelphia *four-county area in terms of IPC* deposits and loans, and it ranks sixth in terms of banking offices. Central-Penn ranks seventh in these three categories. If the proposed merger is consummated, the resulting bank would rank fourth in size based on IPC deposits, third in size based on loans, and first in size based on the number of banking offices. In addition to having the most offices, the geographical coverage of such offices in the four-county area would be the most thorough and extensive of the area banks. With regard to the trust department, Provident currently ranks fourth behind First Pennsylvania, Girard, and Fidelity in the value of assets held and, if the merger is consummated, it would still rank fourth in the value of assets held although it would be first in the number of individual accounts under administration. Concerning the Philadelphia area, the resulting bank, with its increased lending limit and its branch system enlarged, *would be in a position to compete more effectively* with the three largest Philadelphia banks; namely, The First Pennsylvania Banking and Trust Company, The Philadelphia National Bank, and Girard Trust Bank." (emphasis supplied)

3.3 The following sections contain an outline of the facts the defendant Banks expect to prove at the trial. Since the Government's brief made no effort to analyze the business of the Banks, the services they provide, or the competition they face, the Banks do not know whether the facts set forth below are admitted or contested.

B. Background of the Proposed Merger

3.4 *Development of Full Service Banking in Philadelphia.* Any assessment of this merger must be made against the development of modern, full service banking in Philadelphia, which may be summarized as follows:

(a) On April 1, 1926, the first and second largest banks in Philadelphia merged to form Philadelphia-Girard National [16] and the third and fifth largest banks merged to form Franklin-Fourth Street National. On April 9, 1928, Philadelphia-Girard National and Franklin-Fourth Street National merged to form the present Philadelphia National Bank (PNB). PNB was at that time about four times as large as the second largest commercial bank (Corn Exchange National), and it dominated the Philadelphia banking scene until more recent years. No Philadelphia bank could compete with it effectively, particularly in the national market, in correspondent banking, and in international banking. In all these fields PNB was recognized as the only bank of stature in the City.

(b) On December 31, 1940, PNB was still twice as large as its nearest competitor The Pennsylvania Company (which had absorbed the Bank of North America, a commercial bank, in 1929 and Colonial Trust in 1930). PNB's assets of $672 million comprised more than 30% of the total assets of the City's national banks and trust companies combined. After PNB and The Pennsylvania Company ($317 million), the four ranking commercial banks were Corn Exchange National ($155 million), First National ($126 million), Central-Penn National ($90 million), and Tradesmens National ($69 million). There were also three large trust companies (in addition to The Pennsylvania Company): Fidelity-Philadelphia ($158 million), Girard ($153 mil-

16. This bank had no connection with Girard Trust.

lion), and Provident Trust ($76 million). While these trust companies accepted deposits and made loans to a limited extent, they did not engage in general commercial banking. There were also some 33 smaller banks and trust companies, most of them serving local customers in the neighborhoods of their offices.

(c) In 1951, Girard Trust (a leading trust company) and Corn Exchange National (a commercial bank) merged to become the third large full service bank in the City, ranking behind PNB and The Pennsylvania Company.

(d) In 1955, The Pennsylvania Company (which had one of the largest trust departments in Philadelphia) merged with First National (a commercial bank with very little trust business) to form First Pennsylvania, which thus became and still remains the largest commercial bank in Philadelphia.

(e) In 1957, Provident Trust merged with Tradesmens to become the fourth largest bank and trust institution.

(f) The other major trust company, Fidelity, was party to a series of mergers, culminating in its 1964 merger with Liberty Real Estate Bank and Trust Company, which brought Fidelity into fourth position, ahead of Provident.

3.5 The foregoing history of mergers among the city banks since 1940 is one of increasing competition. Whereas in 1940 Philadelphia had only one major bank, which was head and shoulders above the rest, it now has two (PNB and First Pennsylvania) of nearly equal stature, and a third (Girard) not far behind. A fourth (Fidelity) is also now of a size to render effective competition. The Provident–Central-Penn merger will create a fifth. Thus the merger of Provident and Central-Penn is the culmination of a fifteen-year development in which the Philadelphia

commercial banks and the Philadelphia trust companies have joined to produce modern, full service banking institutions. It will give Philadelphia five major banks—all able to compete on a relatively equal basis. Such an array of closely matched competitors is not to be found in any other metropolitan area in the United States.

3.6 *Development of Large Country Banks.* In addition to the evolution of full service city banks, there has been another development in the competitive situation in Philadelphia which has emerged largely after the *Philadelphia National* decision. That development is the creation of two large country banks headquartered in Montgomery County. Continental Bank and Trust Company ($387 million) is the result of the 1965 merger of Broad Street Trust Company and Montgomery County Bank and Trust Company. Industrial Valley Bank and Trust Company ($196 million) is the result of the 1961 merger of Industrial Trust Company and Jenkintown Bank and Trust Company and several subsequent mergers with smaller banks. These large country banks have important competitive advantages over the reserve city banks. They are required to maintain 27% smaller reserves against demand deposits than the city banks and, unlike the city banks, are permitted to invest 40% of their total reserves in interest bearing securities. Moreover, under Pennsylvania law they are permitted to branch, not only in the four-county area, but in three additional counties as well.[17] Both Continental and IVB have

17. The difference in reserve requirements derives from the fact that these two banks are not members of the Federal Reserve System. Continental has also elected to resign membership in the Clearing House, thus obtaining additional advantages by reason of the deferred payment of checks provided for country banks which are not members of that organization. These facts, together with the difference in head office location, make it unlikely that either Continental or IVB will merge with one of the reserve city banks. In any such merger the city bank would have to forego its membership in the Federal Reserve and its city status, or the country bank would have to forego its reserve advantages and its Chester County offices.

branches in Philadelphia, Montgomery, Delaware and Chester Counties. Continental has announced plans for a very large bank and office building at 15th and Market Streets in center city.

3.7 *Development of Branch Banking.* Paralleling the development of full service city banks and large country banks described above has been the development of their branch systems, partly through mergers and partly through *de novo* branching. Branch, or retail, banking has become one of the most important areas of competition among commercial banks, since a large proportion of new customers are attracted to convenient branches. Offices other than the head office account for 90% of individual savings deposits at Provident, 87% of individual savings deposits at Central-Penn and more than 45% of demand deposits of individuals, partnerships and corporations at both Provident and Central-Penn. In 1940 there were 171 commercial banking offices in the four-county region, of which 118 were head offices and 53 branch offices. At present (December 31, 1965) there are 382 commercial banking offices, of which 34 are head offices and 348 branches. The four largest banks (First Pennsylvania, PNB, Girard and Fidelity) have branch systems providing substantially complete coverage of the entire area.[18] The smaller banks have less extensive systems. Provident lacks coverage in lower Bucks County. Central-Penn is deficient in the northeast section of Philadelphia and in upper Montgomery County and Delaware County. Continental and IVB have no branches in Bucks County.

3.8 *Effect of Bank Mergers.* The bank mergers in Philadelphia in the last 25 years have enabled the banks to

18. Complete branch coverage affords competitive advantages in that it enables the bank (a) to offer convenient service to customers who need banking facilities throughout the four-county area and (b) to continue to offer service to all customers no matter where they move within the area. Also, banks with complete coverage can make better use of area-wide advertising.

keep pace with the increasing size of their customers and to respond to the demands of small as well as large customers for more extensive services and facilities. The 1940 array of Philadelphia banks would have been inadequate to meet the needs of the 1965 Philadelphia business and financial community. The 1940 country banks would have been inadequate to meet the needs of modern suburban communities with their growing populations, expanding school districts, municipal authorities and governmental units and their industrial parks, research laboratories and light industry.[19] The local banking services provided by the branch offices and head offices throughout the four-county area at present are superior to those in 1940. And the local customer, who chooses his bank on the basis of convenience, is offered at least as many choices as he was offered 25 years ago, probably more.

C. The Merger is in the Public Interest Because the Merged Bank Will Provide Better Service and More Competition and Will Better Serve Community Needs

3.9 *The Banks Must Grow to Provide Fully Competitive Services.* While all banks deal in the same basic commodities (money and credit), their freedom to compete in this field is restricted by laws and regulations. For this reason, the field of service has become an important area of competition, particularly in metropolitan areas like Philadelphia. Metropolitan banks vie with one another in devising new and improved services, in tailoring services to the specialized needs of individuals and businesses, in making services more conveniently available, and in offering the skilled guidance and wise counsel which is of increasing importance in today's complex financial affairs. Modern

19. In many cases mergers of small country banks and large city banks were initiated by the country bank, which recognized that its financial resources, facilities and personnel were inadequate to serve the growing needs of its community.

businessmen and entrepreneurs prefer to deal with a bank which has a broad line of services available, even if they may not have immediate need for all of them. This kind of service competition calls for a large staff with specialized skills and broad experience. The merged bank, by its prestige and its higher salaries, will be able to attract and hold better qualified personnel. Because it will handle a larger volume and variety of transactions, it will have larger departments, which will permit more expertise and specialization. It will also be able to assign personnel on a full-time basis to forward planning and operations research, which in turn should produce new and better services and more economical operation.

3.10 *Merger is the Only Practical Means of Growth.* Merger is the only practical way for the defendant Banks to achieve the substantial increase in size which both need in order to provide a specialized organization and an inventory of services fully competitive with those offered by larger banks in Philadelphia, New York and other cities. The normal growth in deposits and the normal increase in capital through retained earnings will not produce the required change in the "order of magnitude" of the two banks. Nor will normal growth close the gap between the two banks and the leading institutions in the area. Moreover, the extraordinary internal growth which has been achieved by a few banks in other sections of the country is out of the question in Philadelphia because:

(a) Philadelphia's economy is not expanding enough to generate a substantial change in growth rate for any single bank. In the last 15 years Philadelphia's economic growth, as measured by the growth in employment, has lagged far behind that of most other urban centers; the Philadelphia port has failed to hold its own in the movement of general cargo as against competing ports on the North Atlantic seaboard; and there has been a decline in the number of home offices of substantial businesses in the Philadelphia area.

(b) The Philadelphia four-county area is virtually saturated with banking offices. While new branches will continue to be opened, no bank will be able to steal a march on its competitors because of the scarcity of suitable locations.

(c) The natural alternative of expanding into other nearby communities is foreclosed by law. Philadelphia banks cannot branch into such cities as Camden and its suburbs, Wilmington, Trenton, Downingtown, Coatesville, Reading, York, Bethlehem or Allentown, all of which would be natural targets for expansion if competition were unrestricted.

3.11 *The Merger Will Produce Better Service Through the Combination of Specialties.* The merged bank will also provide better service than either bank offers separately because it will combine the different and complementary traditions and specialties of the two institutions. In this merger, the whole will be greater than the sum of the parts.

(a) Provident was organized in 1922 to take over the banking, trust and fiduciary business of Provident Life and Trust Company. At this point it was a traditional trust company, one of the four largest in Philadelphia. In 1957 it merged with Tradesmens Bank and Trust Company and thus acquired strong construction loan and foreign departments. Trusts, construction lending and foreign banking are still considered its fields of specialty.

(b) Central-Penn is one of the oldest commercial banks in Philadelphia with a strong tradition in commercial lending. In 1950 it purchased The Charter Bank (formerly The Morris Plan Bank), one of the pioneers in consumer lending. Central-Penn and First Pennsylvania are the leading Philadelphia banks in the handling of local automobile dealer paper.

3.12 *The Merged Bank Will be a More Effective Competitor.* The merged bank will be a more effective competitor because the merger will provide a solution to the competitive handicaps facing the separate institutions:

(a) The serious gaps in both the banks' branch systems will be cured by the merger. Provident is well represented in Delaware County, some sections of Montgomery County, and the northeast section of Philadelphia, all areas where Central-Penn has virtually no offices. Central-Penn is well represented in lower Bucks County, where Provident has no branches. The combined branch system will be competitive with those of First Pennsylvania, PNB, Girard and Fidelity. Neither bank could develop such a complete branch system on its own within any reasonable period of time.

(b) Both banks are handicapped in competing in the national market for negotiable certificates of deposit because of their small size. The merged institution will be better able to attract and hold this business.[20]

(c) Central-Penn is handicapped in satisfying the demands of numerous customers for international services, the more complex corporate fiduciary services, certain accounting and financial services, and expert assistance in formulating and carrying out elaborate financial transactions. The addition of Provident's personnel, facilities and skills will fill these needs.

(d) Central-Penn's earnings have not kept pace with those of other major Philadelphia banks.[21] Among

20. Such certificates are issued and purchased on strictly competitive terms as money market investments. The Federal Reserve Bank of New York has noted in its Monthly Review for November 1965 that such a certificate "possesses greater marketability if it is issued by a bank of national repute."

21. Central Penn's relatively high costs and low earnings have depressed the price of the Central-Penn stock. This in turn has made

other reasons, its trust department is too small to operate as an economic unit, and the bank has not yet achieved complete automation of its operations. Provident's large and efficient trust department and more extensive automation will cure these problems.

(e) Central-Penn has lower capital ratios than its major competitors in Philadelphia; Provident has the highest capital ratios of all the Philadelphia banks. Central-Penn's main office quarters are cramped and will have to be expanded or replaced at substantial cost before its leases expire in 1970; Provident has sufficient space available to accommodate the combined operation.

(f) Central-Penn must take steps to solve its problems within the not-too-distant future if it is to attract and retain first class personnel and provide the full line of services its customers demand. Merger with Provident is the obvious and unique solution.

3.13 *The Merger Will Produce Efficiencies and Economies.*[22] The merged bank will be more efficient. There will be immediate savings in excess of $1.25 million annually, of which about half will result from the elimination of duplication of accounting procedures, personnel, equipment and space, and the remainder from more complete automation

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it difficult for Central-Penn to expand its branch system by merger with country banks, whose stocks generally sell at higher prices. Country banks generally expect a "premium" in the market value of the stock they receive in a merger, and the payment of such a "premium" in Central-Penn stock would unduly dilute the equity of Central-Penn's own stockholders.

22. "It must be borne in mind that public convenience and necessity may be found in operating economies and those things which contribute to expedition, public safety and efficiency in operation, because, while they benefit the carrier first, they indirectly contribute to the public safety and more reliable and expeditious and cheaper transportation," *East Texas Motor Freight Lines v. U. S.*, 96 F. Supp. 424, 428 (N. D. Tex. 1951).

and systemization of Central-Penn's present operations. Additional savings are projected for the future. In particular, the larger and more efficient unit will be able to make better use of computers and other automatic devices. These machines have great capacity and high costs, and they entail high risks. The development of new computer services requires large investments in time, money and specialized staff such as programmers and systems engineers. Only large banking units handling transactions in large volume can realize the full potential of computers for efficient conduct of the bank's own operations and expanded services to correspondent banks, financial institutions and other customers. As the larger banking units obtain more advanced equipment with greater capacity and develop more complex services, Provident and Central-Penn will be at an increasing disadvantage.

3.14 *Needs of Local Communities.* The merger will benefit the local communities served by the branches of the two banks. Most branch customers are small customers, but their banking needs are many and varied. The small businessman, investor and entrepreneur may have more need of skilled banking service and advice than his larger rivals:

(a) Local professional and business men need billing, accounting and tax services.

(b) Local real estate developers, businessmen, and homeowners use construction loan services.

(c) Individuals and small businesses often need foreign services, advice and know-how.

(d) Persons who have accumulated funds need fiduciary and investment services.

In all these fields the combined bank will offer more than the present banks do separately. For example, Provident will bring its fiduciary skills (including its experience in

handling small accounts[23] and small businesses owned by trusts and estates) to Central-Penn branches. Experience with previous mergers shows a substantial need for these services.

3.15 *Needs of the Business Community.* In the Philadelphia business community there is a need for specialized and expert service in financial planning. This covers such matters as financing new and expanded plant and equipment; financing inventories and handling and financing accounts receivable; pension and profit sharing trusts; corporate trust and stock transfer services;[24] and export, import and foreign services, including advice and assistance in establishing distribution and production overseas. The merged bank will be in a much better position to meet these needs.

3.16 *Needs of Other Financial Institutions.* The financial community—savings institutions, insurance companies and the like—also need the financial and accounting services which the combined bank will supply. Examples are lock box services, mortgage warehousing and "on-line" accounting services for savings and loan associations. Again it should be noted that small financial institutions need a big bank even more than big institutions do.

3.17 *Needs of Correspondent Banks and Their Communities.* The community to be served includes the country correspondent banks, both inside and outside the four-county area. They look to their city correspondents not only for check clearing and collection, but for assistance in their own operations (for example, cost control, portfolio analysis and operations advice). They also look to their city cor-

23. As of December 30, 1965, Provident had under its administration nearly 7500 trust accounts, of which more than 30% had a book value of $10,000 or less. More than 60% of its 586 guardianships involved $10,000 or less.

24. Girard and First Pennsylvania are dominant in this field. The merged bank would scarcely be in a position to challenge them.

respondents for help in arranging local transactions of a size or complexity beyond their capacity. Central-Penn, with about $20 million, and even Provident with about $40 million of correspondent bank balances are too small to provide these services on the most economical basis. The combined bank will be more efficient and effective.[25] Thus, the benefits of the merger will flow throughout Pennsylvania and other communities served by the correspondent banks.

3.18 *Innovations.* In banking, unlike many other fields, innovations in service and improvements in operations are developed by the larger city institutions rather than the small country banks. Only the larger banks can afford to devote personnel to research and development. It would be impossible for the banking system to handle the flow of modern financial transactions without the innovations developed by the big banks since World War II. A single billion dollar institution such as the merged bank is much more apt to originate a new development of major benefit to the community than two smaller banks.

3.19 *The Needs of Philadelphia.* The larger bank will also be of direct benefit to the Philadelphia community:

(a) Philadelphia is handicapped by its "small town" reputation, and part of this reputation is its "short pants" banks. The kinds of businesses and entrepreneurs which Philadelphia needs to attract and retain rely on banks for flexible, imaginative and up-to-date service. When such a person arranges a financial transaction, he expects prompt, complete and effective bank service in carrying it out. In the Philadelphia area he wants the same kind and quality of service he would get from New York banks. He would

25. It is especially important to provide a new, larger unit in the correspondent bank field because of the dominance of the present leaders (First Pennsylvania and PNB), each of which has correspondent balances in the $200 million range.

expect to get such service from a billion dollar bank, but not from a $300 million bank. The very creation of the new bank resulting from the merger will improve Philadelphia's prestige in the world of business and finance.

(b) Because banks, as personal service organizations, have a large number of capable personnel, governmental, civic and charitable enterprises rely heavily on banks to staff their committees and boards and to provide solicitors and other workers.[26] The combined bank, with its larger staff and more efficient operation, will be better able to meet this need than the present banks, particularly Central-Penn which must operate on a "taut ship" basis insofar as personnel is concerned.

3.20 *Needs of the Philadelphia Port.* The larger bank will help attract business to the Philadelphia port, thus stimulating economic improvement in eastern Pennsylvania and the Delaware Valley, as well as Philadelphia itself. Provident now has "field men" working on an experimental basis with country banks and their customers in the Delaware Valley to encourage and assist them in export business. The merged bank will be better able to continue this costly program. It will also be more attractive to foreign banks and businesses, which are used to dealing with the very much larger banks in other countries.

3.21 *Alternatives if Merger is Enjoined.* Evaluation of community convenience and needs must include consideration of the alternatives if the merger is enjoined. These would include:

(a) The larger banks in Philadelphia and elsewhere would be insulated from bank competition. If Provident and Central-Penn cannot merge to challenge

26. Provident has run several public interest forums and seminars, and the merged bank would be in a position to expand this effort.

the leaders, it is difficult to foresee how they will be subjected to challenging competition in the future.

(b) The benefits described in the preceding sections of this brief would be indefinitely postponed. Neither bank can be expected to achieve a position comparable to the merged bank in the foreseeable future.

(c) Some banking services now being provided might be lost. While Central-Penn's present ownership and management are determined to continue to provide its present services and offer additional services, the competitive pressure to maximize earnings might, in the future, lead to the curtailment or elimination of operations considered to be high in cost or low in profit, (regardless of the community need for such services), thus leaving these particular operations to the big banks which would dominate these particular fields even more than they do at present.

D. The Government's Figures as to Market Shares and Concentration are Meaningless

3.22 The Government argues that the merger may substantially lessen competition or tend to create a monopoly because, according to the Government:

(a) The Philadelphia area is "characterized by a heavy trend of concentration in commercial banking" (p. 41);

(b) The merger would give the merged bank an "undue percentage" of the commercial banking business in the area and would result in a "significant increase" in concentration (p. 47); and

(c) The merger would eliminate competition between Provident and Central-Penn (p. 51).

In advancing these arguments, the Government is relying blindly on the Supreme Court's decision in *Philadelphia*

National without considering the differences between the two situations or the actual facts of the instant case.

3.23 *Distinction Between Bank Mergers and Other Mergers—Trend Toward Concentration.* Arguments based on a "trend toward concentration" assume that one merger in an industry may trigger another. That assumption may have some validity in fields where mergers are regulated only by the Clayton Act. It has no relevance to bank mergers under the Bank Merger Act of 1966 for the reason that all bank mergers are subject to the approval of the regulatory agencies; which are directed not to approve those which will have a substantial anticompetitive effect unless that effect is clearly outweighed in the public interest.[27] Moreover, as demonstrated earlier in this brief, the merger of Provident and Central-Penn is the culmination—not the initiation—of a trend which has produced more—not fewer—full service city banks.

3.24 *Distinctions Between Bank Mergers and Other Mergers—Market Domination.* The recent decisions of the Supreme Court striking down horizontal mergers in other industries, *U.S. v. Von's Grocery Company,* 34 L.W. 4425 (1966), and *U.S. v. Pabst Brewing Company,* 34 L.W. 4516 (1966), rest on a fear of oligopoly. The fundamental premise of the decisions is that a decline in the number of competitors will lead to market domination by a few giants who will have the power to control production and prices and destroy competition (see 34 L.W. 4427, 34 L.W. 4518). This

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27. The Bank Merger Act of 1966, unlike the Clayton Act, also gives the Attorney General advance notice of all bank mergers and the power to obtain an automatic stay by filing a complaint. The Attorney General has not hesitated to use this power. Since passage of the Bank Merger Act, he has commenced action against four bank mergers, including a merger in State College, Pa. involving two banks with combined assets of $34 million. The State College banks abandoned the merger rather than incur the cost of defending the action.

premise has no application to the instant case for the fundamental reason stated in the Comptroller's opinion in this case: "Money, either in the form of savings, deposits, or credits, moves with great ease and rapidity; its flow is not impeded by political boundary lines." Because of the free flow of money across local, state and even national boundaries and among various financial institutions, it is absurd to rest an argument in this case on the notion of oligopoly. Presumably, if Von's Grocery dominated the retail grocery market in Los Angeles, there would be no alternative sources of groceries for the housewife and Von's could control the supply and the price. But if a single bank were to acquire as large a share of the Philadelphia commercial banking market as PNB did from 1928 to 1955, that bank would have no power to control the flow of money or the cost of credit in the Philadelphia metropolitan area because of the alternative sources available to borrowers.

3.25 *Distinction Between Bank Mergers and Other Mergers—Internal Growth.* Another premise underlying the recent Supreme Court decision in horizontal merger cases is that if substantial growth is economically desirable (as is clearly true in the case of both Provident and Central-Penn), it should be accomplished by internal expansion rather than merger. Again, this argument does not apply to bank mergers. In a circumscribed industry like commercial banking, if one competitor is to expand substantially, he can do so only at the expense of others. The total amount of money and credit is substantially controlled by the Federal Reserve Board and cannot be expanded by any single bank. One bank would grow faster than the others only by taking deposits from the others. But a bank is limited in its ability to do this by the intertwined restrictions of state and federal banking laws. It cannot offer interest on demand deposits; it cannot exceed the maximum interest rates permitted on time deposits; it cannot establish branches next to its competitors' branches if that will result in "over-

banking'' or ruinous competition;[28] it cannot establish branches in outlying areas because of restrictions in state laws. The decisions in *Von's Grocery* and *Pabst Brewing* were based on the unspoken assumption that there was a practical alternative to merger in the form of internal growth. In a regulated business such as commercial banking, that assumption is often unjustified. It is unjustified in this case.

3.26 *Actual Concentration.* Insofar as the actual concentration in Philadelphia is concerned, the Federal Reserve Board states in its advisory report (p. 9) that:

> "In this respect, it should be noted that the structure of commercial banking in the Philadelphia four-county area is not unduly concentrated as compared with the nation's major standard metropolitan statistical areas. As of June 30, 1964, the largest bank in the area controlled 21.8 per cent of the area's commercial bank deposits. In only 14 of 84 other major metropolitan areas did the largest bank have a smaller market share. The three largest Philadelphia banks' share was 54.7 per cent; only 16 major SMSA's had lower 3-bank concentration ratios."

The Banks will produce further data which will amply confirm the above statement.

3.27 *Increase in Concentration.* There will be no significant increase in the concentration ratio as a result of the merger. On the basis of the data in the Federal Reserve Board report (p. 8), the percentages of IPC deposits of the

28. "The legislature . . . did not exclude or intend to exclude competition between banks; it intended, inter alia, to exclude such competition as would likely weaken or destroy some banks in an overbanked community and thus weaken or injure the entire banking system, to the detriment of depositors, creditors, stockholders, and the public alike," *Dauphin Deposit Trust Company v. Myers,* 401 Pa. 230, 241 (1960).

seven largest banks before and after the merger are as follows:

Percentages of IPC Deposits

Before Merger		*After Merger*	
First Pennsylvania	20.2	First Pennsylvania	20.2
PNB	17.6	PNB	17.6
Girard	16.2	Girard	16.2
Fidelity	12.8	Provident	15.1
Provident	9.7	Fidelity	12.8
Continental	5.8	Continental	5.8
Central-Penn	5.4	IVB	2.8

There is no significant increase in concentration in those figures.

3.28 *"Undue Percentage."* The merger will not, as the Government avers, give the merged bank an "undue percentage" of the commercial banking business. The phrase "undue percentage" is, of course, lifted from the Supreme Court's opinion in *Philadelphia National* (374 U.S. 363). The Government ignores the fact that in *Philadelphia National* the phrase was applied to a share of "at least 30% of the commercial banking business," to be held by a bank which would have been half again as big as its nearest rival. The Supreme Court was concerned with the market power which such a bank would acquire from the merger.[29] In the instant case Provident will be the fourth bank, less than two-thirds the size of the leading bank. According to the Government, its share will be less than 15% of the artificially restricted market chosen by the Government as its

29. The Court cited the bench mark of 20% proposed by Kaysen & Turner, Antitrust Policy (1959) at page 133. In suggesting that percentage Kaysen & Turner were concerned with "market power," which they defined as the power to "behave persistently in a manner different from the behavior that a competitive market would enforce on a firm facing otherwise similar cost and demand conditions" (p. 75). No one could contend that Provident or Central-Penn has any such power now or will have any such power after the merger.

statistical base. In the context of commercial banking in Philadelphia, such a share cannot be characterized as "undue." The fact that smaller percentages have been found unlawful in horizontal merger cases in fields other than banking (*Brown Shoe, Von's Grocery,* and *Pabst Brewing*), is irrelevant for two reasons:

(a) In those cases it can be assumed that the percentages were an accurate measure of the merged company's share of a market with economic validity. In the instant case the percentage does not relate to a valid market because the Government's market definition fails to take into account banks outside the four-county area and other financial institutions both inside and outside the area.

(b) Banking (unlike shoes, groceries [30] and beer) is regulated to meet the convenience and needs of the community and, as shown earlier in this brief, the Philadelphia community will gain more from the creation of an additional billion dollar bank than it may lose by the elimination of the separate corporate entity of Central-Penn.

3.29 The Government cannot seriously argue that the merged bank will have an "undue" percentage of the banking business. The Government's pretrial brief adopts the figure of 14% of the deposits of banks headquartered in the four-county area (par. 132). This figure would drop to about 12% if the other banks in the Philadelphia Standard Metropolitan Statistical Area were taken into account. It would drop further if the banks in the four adjacent Pennsylvania counties and in Wilmington and Trenton were added to the base. And it would indeed become miniscule if competitive banks in Pittsburgh, New York and other financial centers were included, as they should be. By compari-

30. The obvious difference between banking and groceries was cited by Justice Holmes to justify state insurance of bank deposits in *Noble State Bank v. Haskell,* 219 U. S. 104, 112 (1910).

son, the market share of Manufacturers Hanover Trust Company was 13.9% of deposits in the New York market and 4.11% of the deposits in the national market. The District Court for the Southern District of New York, in *U.S. v. Manufacturers Hanover Trust Co.*, 240 F. Supp. 867, 932 (1965), held that the Manufacturers Hanover share did not warrant a conclusion that the merger was inherently illegal.[31] Congress agreed. The Manufacturers Hanover merger is one of those which, under Section 2(a) of the Bank Merger Act of 1966, is "conclusively presumed to have not been in violation of any antitrust laws other than [Section 2 of the Sherman Act]." Congress enacted this conclusive presumption after the District Court had ruled against the merger and the parties had reached agreement on a method of divestiture. Clearly, Congress was not alarmed by a market share of less than 15% in the banking field.

E. The Competition Between Provident and Central-Penn is Insignificant

3.30 *The Banks Have Complementary Fields of Specialization.* By reason of the difference in their origins and development, Provident and Central-Penn historically specialized in different fields. Thus:

(a) Provident holds more than $2 billion in trust assets, whereas Central-Penn's trust department holds only about $140 million, despite the fact that it was established many years ago and has been actively promoted for the last ten years. Provident each year increases its trust assets by more than twice Central-Penn's total amount.

(b) Provident has an active, growing international division, whereas Central-Penn has not developed international business of consequence.

31. The court later held the merger illegal because of the substantial competition between the merged banks, 240 F. Supp. 867.

(c) Provident has one of the two largest construction loan departments among Philadelphia banks, accounting for about $20 million of its loans, whereas Central-Penn's construction loans total only about $3 million a large number of them being concentrated in lower Bucks County where Provident is not represented.

(d) Central-Penn buys the bulk of its consumer paper from local automobile dealers, many of the loans being purchased without recourse so that the loans become, in effect, direct loans from the bank to the consumer. At April 30, 1966, Central-Penn had approximately $41 million of loans purchased from local auto dealers and $8 million of loans under automobile floor plans with local dealers. Provident, on the other hand, purchases most of its consumer paper from sources outside the four-county area (and indeed outside the State of Pennsylvania). Many of these loans are purchased on a full recourse basis so that the loans are, in effect, from the bank to the dealer rather than to the consumer.

3.31 *The Banks Have Complementary Branch Systems.* By reason of the location of their branches, Provident and Central-Penn serve different local communities. Both the Comptroller and the Federal Reserve Board recognized this fact, although the Board qualified its opinion to the extent of stating that there was a significant degree of competition between individual offices of the two banks in 10 locations. The locations are listed on page 4 of the Board's report. Upon receipt of the Board's report, the Banks engaged First Research Corporation of Miami, Florida, to plot the actual service areas of the branches singled out by the Board as being in competition (with the exception of the head offices, the offices on 17th Street which are essentially annexes of the head offices, and the offices on 12th Street and at Juniper and Market Streets). The First

Research Corporation's report confirmed the Banks' belief that there is in fact no substantial competition between the branches covered by their survey. It was submitted to the Comptroller and the Attorney General, and a copy thereof is being supplied to the Court concurrently with the filing of this brief. The Banks submit that the First Research Corporation's report demonstrates that the Federal Reserve Board's advisory report was based on a misapprehension as to the extent of competition between the Provident and Central-Penn branch systems. This, in turn, tends to invalidate the adverse conclusion expressed by the Federal Reserve Board.[32] The Banks will produce at trial maps and studies showing the areas served by all their branches and demonstrating that the branch systems of the two banks are complementary rather than competitive with one another.

3.32 *Other Choices Available to Banks' Customers.* While the Banks are concededly in competition to some degree for the customers of their head offices, such competition is not substantial in relation to the other choices available to such customers:

(a) Every customer who calls at the head office of Provident or Central-Penn can equally easily call at the head office of First Pennsylvania, PNB, Girard, Fidelity, and Lincoln National—none of which is more

32. While the Federal Reserve Report concludes that the overall effect of the merger would be "significantly adverse," the bulk of its contents suggests a different conclusion. The Board noted that Provident and Central-Penn are "complementary rather than competitive" in branch office locations and services, that "even where the offices of the two banks do compete there is usually an office of a larger bank in the same area," that "the variance in the legal lending limit of the two banks tends to lessen competition for the larger commercial loans," that Philadelphia banks compete not only with each other but with commercial banks in New York and Pittsburgh, and that they also face competition from other financial institutions. The Board's unfavorable conclusion after this list of favorable factors seems to rest largely on its mistaken finding as to the competition between branches.

than six blocks away. He also has easy access to the Philadelphia office of Brown Brothers Harriman & Co. and to offices of Continental and IVB which, though officially designated as branches, are staffed by senior management officers of those banks.

(b) If such a head office customer wished to "shop around" in the neighborhood of Philadelphia, he could readily find additional banks. If he were located in center city, he could cross the river to Camden. In much of Delaware County, Wilmington is more readily available than Philadelphia. Other parts of Delaware County are closer to West Chester and even Downingtown in Chester County. Upper Montgomery County is closer to Reading in Berks County. Upper Bucks County is closer to Allentown in Lehigh County or Bethlehem in Northampton County. Lower Bucks County is closer to Trenton and Burlington in New Jersey. For little if any additional effort any Philadelphia customer can deal with the banks in New York. They advertise their checking service and the availability of their mortgage funds to commuters in the Paoli local.

(c) A large proportion of head office customers are of sufficient importance to be subject to regular solicitation from banks located outside the four-county area, particularly in New York. The business of these large customers was recognized to be in the national market—rather than the local market—in *Manufacturers Hanover*, 240 F. Supp. 867, 920.

(d) Customers of Provident and Central-Penn with residences or offices outside the four-county area have a choice of banks in the localities in which they are located.

3.33 *Deposits and Loans Allocable to National Accounts and Those Outside Four-County Area.* Attached

to this brief as Exhibit B is a chart showing with respect to Central-Penn the deposits and loans allocable to national accounts and those outside the four-county area. The figures shown are subject to further investigation and refinement, but it is not expected that this will result in anything other than minor changes between now and the trial.[33] The schedule requires a few words of explanation:

(a) Column 1 shows Central-Penn's deposits and loans as of April 30, 1966 in each of the categories listed on the report of Condition which Central-Penn must file on the call of the Comptroller of the Currency.

(b) Column 2 lists the total dollars of accounts in the categories which were held to be in the national market in the *Manufacturers Hanover* case.

(c) Column 3 lists the total dollars of accounts which are not within the categories approved in *Manufacturers Hanover* but which, in Central-Penn's judgment, are in the national market because of their individual characteristics. Each such account was personally reviewed by the responsible bank officer. If necessary, all the bank officers will be called to testify at the trial.

Column 3 also shows the total of Central-Penn's savings deposit accounts and saving certificates in excess of $10,000. Savings accounts of this size are solicited by savings institutions throughout the United States, particularly in California, and should be considered as in the national market.[34]

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33. A similar chart with respect to Provident is attached as Exhibit C.

34. The opinion of Judge McMahon in *Manufacturers Hanover* listed savings deposits as in the local market. However, this question was of little importance in the case because Hanover had no savings deposits whatever. In addition, national solicitation of savings deposits has increased enormously since his opinion because of the sharp rise in interest rates.

(d) Column 4 lists those accounts, not already excluded as national accounts, which are located outside the four-county area.

(e) Column 5 shows the dollars remaining after exclusion of national and outside accounts.

3.34 *Residual Competition Between Provident and Central-Penn.* As appears from Exhibit B, the maximum amount of Central-Penn's $332 million of deposits and $227 million of loans which could be considered in measuring Central-Penn's competition with Provident would be about $153 million and $79 million, respectively. A large proportion of Central-Penn's $49 million of automobile dealer paper should be eliminated from this total because it is obtained from different areas than Provident's automobile dealer paper. A large proportion of the $130 million of deposits and $45 million of loans at the Central-Penn branches which do not compete with Provident should also be eliminated. After these eliminations, the residue of Central-Penn's deposits and loans for which Provident can be said to compete is insignificant.

3.35 *Competition From Other Financial Institutions.* Competition between Provident and Central-Penn must be evaluated in the light of competition from other financial institutions. It is impossible to measure this competition with precise accuracy because the figures are not available for many institutions with respect to the four-county area.[35] However, at the trial the Banks will offer information which will fairly demonstrate that when other financial institutions are considered, the effect of the proposed merger on competition would be—as the Comptroller found—"miniscule."

35. The absence of these figures is a good indication that the four-county area is not a natural market.

IV. CONCLUSION

The Government's case, as outlined in its pretrial brief, fails to show that the merger may substantially lessen competition and fails to challenge the Comptroller's findings as to the benefits of the merger in enhancing competition and meeting the convenience and needs of the community to be served.

Respectfully submitted,

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Dated: August 5, 1966.

EXHIBIT A

The following is a paragraph-by-paragraph response to the Government's Pretrial Brief. The headings follow those used by the Government.

I. Introduction

1-5. The Banks agree with the statements in paragraphs 1 through 5.

6. The Government states its position to be that the proposed merger violates Section 7 of the Clayton Act, and says that this position is "contested." While the Banks believe that the merger would not violate Section 7, that is not an issue in this case. The issue in this case is whether the Comptroller acted arbitrarily, capriciously or unreasonably in finding that the merger meets the statutory criteria of the Bank Merger Act of 1966.

II. Applicable Statutes

7-8. The Banks disagree that Section 7 of the Clayton Act is applicable. They agree that the Bank Merger Act of 1966 is applicable. Notably, the Government has not quoted the Bank Merger Act in full, and has omitted the portion which requires that this Court, in judging the merger, must apply the identical standards which the Comptroller is directed to apply.

III. The Proposed Merger

9-11. The statements in paragraphs 9 through 11 are correct.[36]

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36. The Government has not accurately stated the conclusions of the Federal Reserve Board and the Attorney General as to competitive effect. The conclusion of the Federal Reserve Board was that the adverse effect of the proposed merger would be "significant"; the Attorney General said it would be "important and considerable".

IV. The Defendants

12-33. The statements in these paragraphs are correct, except for the contention in paragraphs 13 and 24 that certain assets of Provident and Central-Penn are "attributable" to mergers. It is true that the assets of the banks which merged into Provident and Central-Penn totalled the figures given. However, it is incorrect to "attribute" the Banks' present position to those assets. No customer is chained to his bank. The loans outstanding, for example, at Northern Trust in 1948 at the time of its merger into Provident have long since been replaced by other loans to other customers.

Certain of these paragraphs (20-2, 31-3) contain conclusory statements concerning the Banks' operations, which the Government says are admitted in the Application and in the documents produced by the Banks pursuant to the Goverment's Rule 34 Motion. No specific reference is made by the Government to any particular document within the mass produced by the Banks. While admitting the general correctness of the statements, the Banks disclaim any admission as to specific characteristics (here and elsewhere in the brief), such as "sound," "strong," "of the most modern and efficient" and so forth. The correctness of such characteristics can be judged only in context with the conclusions which the Government seeks to draw therefrom, and the Government has not stated what such conclusions are.[37]

V. Statement of the Issues

34-36. The Government would have the Court treat this as a traditional injunction action under Section 7 of the Clayton Act, and has framed the "issues" along Section 7 lines. However, this case is governed by the Bank Merger Act of 1966, not Section 7. To the extent the Government's

37. Paragraph 21 contains a typographical error. Provident's downtown office was opened in 1966.

"issues" are pertinent under the Bank Merger Act, they are discussed in the Banks' brief.

Particular Issues Under the Bank Merger Act

37. This paragraph again reveals the Government's basic misconception—namely, that this is a Section 7 case for which the Bank Merger Act provides "special defenses." The Government refuses to recognize that Congress has enacted particular standards for bank mergers.[38]

38-71. These paragraphs are an extended discourse on the technical question whether this suit is brought "under" the antitrust laws or "under" the Bank Merger Act. This is all beside the point. Conceding for the sake of argument that the Government sues under the antitrust laws, nevertheless the standards to be applied in this case are those provided in the Bank Merger Act.

72-79. *Burden of Proof.* This legal issue is discussed in full in the Banks' brief (Paragraphs 2.6-2.7). The Government must prove its case. If the Government makes no effort to rebut the Comptroller's findings, which are presumptively valid, the findings must stand.

80-86. *Review de novo.* This legal issue is also discussed at length in the Banks' brief (Paragraphs 2.3-2.5). The Government asks the Court to substitute its judgment for the Comptroller's on the question whether this merger is in the public interest. To do so would exceed the accepted scope of review of administrative decisions. It would also exceed the Court's judicial power under the Constitution.

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38. It should be noted that in subparagraph b the Government has misquoted the Banks' answer. While contending that the merger is pro-competitive, the answer states that "any" anticompetitive effect is clearly outweighed by the public interest. The Government substitutes "the" for "any", an unwarranted attempt to infer that the Banks have conceded anticompetitive effect.

VI. Argument

A. *Line of Commerce*

This imaginary issue, again growing from the misconception that this is a Section 7 case, is dealt with in the Banks' brief (Paragraphs 2.10-2.14). The phrase "line of commerce" is not in the statute.

87-89. The statements concerning the services which can be offered by commercial banks are correct. It should be noted, however, that the demand deposit and checking account are increasingly less "unique," have diminished in importance, and may virtually disappear.[39] Economists are already talking about the "checkless society" in which transactions will be handled by credit cards and managed by central computer stations.

It is also true that most large commercial banks offer most of the "cluster of services" described, although, as with Provident and Central-Penn, the extent and effectiveness of individual services varies from bank to bank. It is likewise true, as the Government states in paragraph 89, that banks face competition across the board from other financial institutions. It is this competition which the banks contend should be taken into account in this case.

90. The Banks will introduce testimony at the trial to demonstrate that the Government's contention that commercial banks in today's market are insulated from competition for small loans and savings deposits is absurd.

91-102. These paragraphs are intended to show that Congress omitted "line of commerce" from the Bank Merger Act by mistake; and that the Act should be interpreted as though the phrase were inserted. To the extent such an argument deserves answer, it has been made in the Banks' brief (Paragraphs 2.10-2.14). As indicated there, the phrase was omitted to prevent fragmenting—*i.e.*, to prevent the

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39. In some states, mutual savings banks may accept demand deposits.

Government from singling out a minor aspect of a bank's business when the effect of the merger as a whole would be beneficial. The Government attempts to discredit Senator Robertson's explanation of this point by claiming that he was expressing his own views. The same can be said for all the opponents of the Bill, whose remarks are quoted at length throughout the Government's brief. Indeed, when Senator Robertson's statements seem to favor the Government's position, the Government quotes him with approval. (Government brief, par. 70).

B. *Section of the Country*

103. The Banks agree entirely with the Government's statement of the importance of convenience in banking. At the trial, the Banks will show that by reason of the convenience factor, their branch systems are not in competition.

104. This table is not an entirely accurate representation. As filed, the Government's interrogatories asked the Banks, in effect, for the names and addresses of all their depositors (broken down according to numerous sizes of account), so that the Government could compute the percentage located within the four-county area. This would have imposed an impossible burden on the Banks, particularly with respect to accounts of $10,000 or less, which number in the hundreds of thousands. It was agreed that the Banks would analyze their accounts in excess of $10,000 to determine the total dollars of such accounts originating outside the four-county area. This was subsequently done, and the figures were furnished to the Government. In addition, the Banks advised the Government that because of the tremendous burden, they were unable to make a comparable analysis for accounts under $10,000 and therefore would make no claim that any of those customers are located outside the four-county area.

The Government's table ignores the Banks' figures as to accounts in excess of $10,000 originating outside the four-

county area. It simply shows the percentage of the Banks' accounts in various categories which are less than $10,000 and assumes that all these customers are located inside the four-county area. While most of these customers are in fact located inside the four-county area, the dollars involved in their accounts are a much lesser percentage than those shown in the Goverment's table. The percentage of total deposits and loans represented by accounts under $10,000 is:

	Provident	*Central-Penn*
Total deposits	26%	32%
Total loans	24%	31%

The Government says its table evidences that "The great bulk of the banks' customers, those 'that are neither very large nor very small,' find it convenient to do their banking in the four-county area." This statement is difficult to understand. Necessarily, since all Provident customers bank at Provident, they *all* find it convenient to bank here. Since the table is concerned with accounts from 0 to $10,000, it relates only to Provident's smallest customers.

105. These figures are taken from the Banks' analysis of accounts over $10,000 and are correct, except that the figures concerning loans to individuals are, like the table above, simply the percentages represented by accounts under $10,000.

106. The statement in this paragraph is correct, except that the Federal Reserve Board was careful to point out that the Banks encounter significant competition from banks outside the four-county area and significant competition from other financial institutions within the area. (Advisory opinion, page 10).

107. The statement that the State of Pennsylvania restricts branching of banks to contiguous counties is correct, although it does not follow that the arbitrarily drawn four-county area is a meaningful area for measuring com-

petitive effects. The Pennsylvania law is one of the reasons why this merger should be approved.

108-109. We assume the Government's contention that the proposed merger will affect competition "anywhere in the United States" is not to be taken seriously. The combined bank will hold about one-quarter of one per cent of the nation's commercial bank assets.

110. This paragraph gives the Government's reasons for choosing the four-county area as the "section of the country" within which, under the Bank Merger Act, the Government must show a substantial lessening of competition. The Banks' position in this regard is fully set out in its brief (Paragraph 2.9).

C. *Effect on Competition*

111-114. The Banks agree that the statistics in this paragraph are accurate, except for paragraph 112, which is still being checked;[40] and except that, as stated earlier, it is impossible to "attribute" particular bank assets or liabilities to a merger made many years ago. In addition, the Government is presumably referring in paragraph 111 to banks which have offices within the four-county area. As pointed out in the Banks' brief, the number of banks who actively solicit business in this area is far greater.

115. It is agreed that on more than one occasion both banks have had discussions, of varying degrees of seriousness, concerning mergers with other banks.

116. The statistics are accurate.

117-124. These paragraphs are a rehearsal of the Government's notion that there has been a trend toward con-

40. The Banks have no reason to believe that the statistics in paragraph 112 will prove to be inaccurate.

centration in Philadelphia banking. This is fully answered in the Banks' brief (Paragraphs 3.4-3.8, 3.23). There are more banking offices in the Philadelphia area today than there were 25 years ago, and, more important, more full-line commercial banks offering better services.

125-128. The statistics are accurate.

129-135. These paragraphs argue that the combined bank would hold an "undue percentage share" of the market which, under the Section 7 cases, would be unlawful. Here again, a full answer is given in the Banks' brief (Paragraphs 3.28-3.29).

136-138. The Government here argues that "all competition" between Provident and Central-Penn will be eliminated by the merger. It makes no effort to analyze the extent of that competition. The Banks concede that to the extent competition exists between them, it will, of course, be eliminated by the merger. The Banks will show, however, that upon analysis this competition is insignificant. The merger will not adversely affect the competitive picture in Philadelphia.

EXHIBIT B

CENTRAL-PENN NATIONAL BANK
DEPOSITS & LOANS ALLOCABLE TO CUSTOMERS IN NATIONAL MARKET & OUTSIDE FOUR-COUNTY AREA
APRIL 30, 1966

Category	Total Amounts Before Allocation 1	*Amounts Allocated to National Market* National Market Defined in Manufacturers-Hanover Case 2	Additional Amounts Attributable to Customers Considered in National Market 3	Additional Amounts Attributable to Customers Outside Four-County Area 4	Residual Amounts 5
Demand Deposits					
IPC	$177,795,454.	$ 79,763,307. (1)	$ 6,375,597.	$ 449,601.	$ 91,206,949.
United States	9,017,064.	8,835,276. (1)	—0—	—0—	181,788.
States	3,834,172.	3,412,094. (1)	—0—	—0—	422,078.
Banks	22,234,283.	20,107,517. (1)	2,126,766.	—0—	—0—
Other	2,783,695.	—0—	—0—	—0—	2,783,695.
Total Demand	$215,664,668.	$112,118,194.	$ 8,502,363.	$ 449,601.	$ 94,594,510.

Time Deposits					
IPC					
Time Open	$ 5,815,643.	$ 5,815,643. (2)	$ —0—	$ —0—	$ —0—
C/D's	13,412,379.	13,412,379. (2)	—0—	—0—	—0—
Savings Accts.	68,941,626.	—0—	19,086,299. (4)	—0—	49,855,327.
Savings Certif.	11,983,091.	—0—	5,162,028. (4)	—0—	6,821,063.
United States	—0—	—0—	—0—	—0—	—0—
States	13,599,864.	13,404,297. (1)	—0—	—0—	195,567.
Banks	1,008,300.	1,000,000. (1)	8,300.	—0—	—0—
Other	1,656,422.	—0—	—0—	—0—	1,656,422.
Total Time	$116,417,325.	$ 33,632,319.	$ 24,256,627.	$ —0—	$ 58,528,379.
TOTAL DEPOSITS	$332,081,993.	$145,750,513.	$ 32,758,990.	$ 449,601.	$153,122,889.
Loans					
Real Estate	$ 20,336,134.	$ 12,979,903. (1)*	$ —0—	$ 469,851.	$ 6,886,380.
Financial Instit.	19,501,725.	19,501,725. (2)	—0—	—0—	—0—
Securities	1,006,339.	1,006,339. (2)	—0—	—0—	—0—
Farmers	7,600.	—0—	—0—	—0—	7,600.
Comm'l. & Indust.	106,569,982.	77,367,299. (1)	194,140.	3,031,112.	25,977,431.
Consumer					
Direct	14,617,362.	—0—	—0—	—0—	14,617,362.
Dealers	46,796,429.	—0—	17,939,595.	4,554,204.	24,302,630.
Single Payment	12,842,676.	6,321,644. (3)	—0—	—0—	6,521,032.
Other	5,159,125.	4,341,270. (1)	—0—	—0—	817,855.
TOTAL LOANS	$226,837,372.	$121,518,180.	$ 18,133,735	$ 8,055,167.	$ 79,130,290.

(1) All $100,000 or more; (2) All accounts; (3) All $25,000. or more; (4) All $10,000 or more.
* Includes loans on properties inside and outside four-county area.

EXHIBIT C

PROVIDENT NATIONAL BANK
DEPOSITS & LOANS ALLOCABLE TO CUSTOMERS IN NATIONAL MARKET & OUTSIDE FOUR-COUNTY AREA

APRIL 30, 1966

		Amounts Allocated to National Market			
Category	*Total Amount Before Allocation* 1	*National Market Defined in Manufacturers-Hanover Case* 2	*Additional Amounts Attributable to Customers Considered in National Market* 3	*Additional Amounts Attributable to Customers Outside Four-County Area* 4	*Residual Amounts* 5
Demand Deposits					
IPC	352,220,801.79	168,987,035.47 (1)	14,006,134.55	4,758,078.06	164,469,553.71
U.S. Government	15,779,309.87	15,551,371.03 (1)	—0—	—0—	227,938.84
State & Political Subs.	10,607,134.28	9,590,886.25 (1)	135,328.41	—0—	880,919.62
Banks	44,895,372.63	42,420,111.54 (1)	2,475,261.09	—0—	—0—
Others	6,097,036.94	—0—	—0—	—0—	6,097,036.94
Subtotal before Adjustments	429,599,655.51	236,549,404.29	16,616,724.05	4,758,078.06	171,675,449.11
Net Adjustment for lost checks, incorrect incoding of checks & deposits, etc.	(14,330.83)				(14,330.83)
TOTAL DEMAND	429,585,324.68	236,549,404.29	16,616,724.05	4,758,078.06	171,661,118.28

Time Deposits					
IPC					
Time Open	34,284,929.96	34,284,929.96 (2)	—0—	—0—	—0—
C/D's	27,706,615.51	27,706,615.51 (2)	—0—	—0—	—0—
Savings a/c's & Ctfs.	122,644,470.16	—0—	49,774,336.07 (4)	—0—	72,870,134.09
Subtotal—IPC	184,636,015.63	61,991,545.47	49,774,336.07	—0—	72,870,134.09
U.S. Government	54,961.73	—0—	—0—	—0—	54,961.73
State & Political Subs.	17,045,736.88	15,520,018.30 (1)	—0—	20,378.24	1,505,340.34
Banks	2,505,000.00	1,760,000.00 (1)	745,000.00	—0—	—0—
Others	2,059,539.59	—0—	—0—	—0—	2,059,539.59
Subtotal before Adjustments	206,301,253.83	79,271,563.77	50,519,336.07	20,378.24	76,489,975.75
Net Adjustment for unposted & Deferred Items	62,161.50				62,161.50
TOTAL TIME	206,363,415.33	79,271,563.77	50,519,336.07	20,378.24	76,552,137.25
TOTAL DEPOSITS PER STATEMENT OF CONDITION, APRIL 30, 1966	635,948,740.01	315,820,968.06	67,136,060.12	4,778,456.30	248,213,255.53

		Amounts Allocated to National Market			
Category	*Total Amount Before Allocation* 1	*National Market Defined in Manufacturers-Hanover Case* 2	*Additional Amounts Attributable to Customers Considered in National Market* 3	*Additional Amounts Attributable to Customers Outside Four-County Area* 4	*Residual Amounts* 5
Loans					
Real Estate	$ 24,071,177.27	$ 4,660,154.75 (1)*	$ 77,512.00	$ 89,945.63	$ 19,243,564.89
Financial Instit.	43,339,192.68	43,339,192.68 (2)	—0—	—0—	—0—
Securities	23,770,060.28	23,770,060.28 (2)	—0—	—0—	—0—
Farmers	263,631.79	248,366.53	—0—	—0—	15,265.26
Comm'l. & Indust.	194,242,225.84	149,058,978.64 (1)	1,604,105.22	423,968.75	43,155,173.23
Consumer					
Direct	27,491,708.89	—0—	* 54,524.70	—0—	27,437,184.19
Dealers	53,278,648.85	50,490,719.61 (1)	1,279,062.04	167,308.62	1,341,558.58
Single Payment	37,648,492.05	19,545,665.25 (3)	681,249.16	1,523,511.50	15,898,066.14
Other	7,938,433.72	4,722,951.44 (1)	—0—	—0—	3,215,482.28
TOTAL LOANS	$412,043,571.37	$295,836,089.18	$3,696,453.12	$2,204,734.50	$110,306,294.57

(1) All $100,000 or more; (2) All accounts; (3) All $25,000. or more; (4) All $10,000 or more.

* Includes loans on properties inside and outside four-county area.

BANKS OPERATING OFFICES IN PHILADELPHIA AND ADJACENT COUNTIES

("THE FOUR-COUNTY AREA")

BANKS PERMITTED BY STATUTE TO BRANCH INTO THE AREA

BANKS IN ADJACENT COMMUNITIES

A. RELEVANT STATUTORY PROVISIONS

1. *Membership in Federal Reserve.* All national banks are required to be members of the Federal Reserve System. State banks may elect to become members. The term "member bank" includes national banks and state member banks: 12 U.S.C.A. §§221, 282, 321; 7 P.S. §203.

2. *Reserve Requirements for Member Banks.* Member banks are required by the Federal Reserve Act to maintain non-interest bearing reserve balances in available funds with the Federal Reserve bank in their Reserve City. The Act provides different reserve requirements for member banks which are located in the Reserve City (generally known as "reserve city banks") than for other member banks (known as "country banks"): 12 U.S.C.A. §462. The current reserve requirements are (12 CFR §204.5, as amended June 27, 1966, 31 Fed. Reg. 9103):

City Banks — 16½% of net demand deposits
plus
4% of savings deposits, 4% of other time deposits up to $5 million, and 5% of such deposits in excess of $5 million.

Country Banks — 12% of net demand deposits
plus
4% of savings deposits, 4% of other time deposits up to $5 million, and 5% of such deposits in excess of $5 million.

3. *Reserve Requirements for Non-Member Banks.* Pennsylvania banks which are not federal reserve members are required to maintain reserves equal to 12% of demand deposits and 4% of time deposits: 7 P.S. §703; Pa. Dept. of Banking Regulations §1(a). The bank can invest up to 40% of its reserve fund in obligations of the United States, the Commonwealth of Pennsylvania, or any political subdivision or public body of the Commonwealth. The remainder may be deposited with another bank qualified to act as a reserve agent. 7 P.S. §§702, 704, 610; Pa. Dept. of Banking Regulations §1(b).

4. *Provisions as to Branching.* A Pennsylvania bank is permitted, subject to the approval of the Pennsylvania Department of Banking, to establish *de novo* branches in the county where its principal place of business is located or in a county contiguous thereto. If the location is outside the city, incorporated town, borough or township where the principal place of business is located, the bank is required to give written notice of the filing of its application to each other bank whose principal place of business is located in the county where the proposed branch is to be located: 7 P.S. §904(b).

A national bank may, with the approval of the Comptroller of the Currency, establish *de novo* branches at any point within the state in which the bank is located if such establishment is authorized to state banks by the state in question: 12 U.S.C.A. §36.

Upon merger or consolidation, the resulting institution may retain all offices of the constituent institutions which are located in the same county as the principal place of business of the resulting institution or in a contiguous county: 7 P.S. §904(a); 12 U.S.C.A. §36.

B. Philadelphia County

1. *Branching Areas*

Philadelphia Banks Can Branch Into These Counties	*Banks With Principal Offices In These Counties Can Branch In Philadelphia*
Philadelphia	Delaware
Delaware	Montgomery
Montgomery	Bucks
Bucks	

2. (a) *Reserve City Banks*	*Total Resources* (Thousands)
The First Pennsylvania Banking and Trust Company (First Pennsylvania	$1,638,316
The Philadelphia National Bank (PNB)	1,490,935
Girard Trust Bank (Girard)	1,137,927
Fidelity-Philadelphia Trust Company (Fidelity)	884,189
Provident National Bank (Provident)	711,206
Central-Penn National Bank (Central-Penn)	371,003
2. (b) *Other Banks*	
Brown Brothers Harriman & Co. (Brown Bros.)[1/2/]	318,945
Frankford Trust Company (Frankford)[2/]	73,741
Lincoln National Bank (Lincoln)[3/]	13,798
The Citizens Bank (Citizens)[2/]	6,188
Pennsylvania Warehousing and Safe Deposit Co. (Pa. Warehousing)[2/4/]	6,077
Sonsitaly Bank and Trust Company (Sonsitaly)[2/]	5,667
The Marian Bank (Marian)[2/]	1,609

1. Private bank with offices in Philadelphia, New York and Boston.

2. Non-member of Federal Reserve.

3. While technically within the definition of a city bank, this institution has been excused from the city bank reserve requirements by administrative action.

4. Specialized institution doing a limited commercial banking business.

3. *Number of Banking Offices*

Philadelphia Banks (principal offices and branches)		*Montgomery County Banks* (branches)	
First Pennsylvania	33	Continental	20
PNB	15	IVB	10
Girard	26	Cheltenham Natl.	2
Fidelity	25		—
Provident	20		32
Central-Penn	13		
Brown Bros.	1		
Frankford Trust	3	*Camden County, N.J. Banks* (*branches*)	
Lincoln	1		
Citizens	3		
Pa. Warehousing	1	First Camden Natl.	1
Sonsitaly	1		
Marian	1		
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C. Delaware County

1. *Branching Areas*

Delaware County Banks Can Branch Into These Counties	*Banks With Principal Offices In These Counties Can Branch Into Delaware County*
Delaware	Philadelphia
Philadelphia	Montgomery
Montgomery	Chester
Chester	

2. *Banks*

Banks	*Total Resources (Thousands)*
Delaware County National Bank (Del. Co. Natl.)	$111,315

3. *Number of Banking Offices*

Delaware County Banks (principal offices and branches)

Del. Co. Natl.	8

Philadelphia Banks (branches)

First Pennsylvania	7
PNB	6
Girard	14
Fidelity	11
Provident	6
Central-Penn	1
	45

Montgomery County Banks (branches)

Continental	4
IVB	1
Bryn Mawr Trust	1
	6

Chester County Banks (branches)

Natl. Bank of Chester Co.	1

D. Montgomery County

1. *Branching Areas*

Montgomery County Banks Can Branch Into These Counties	*Banks With Principal Offices In These Counties Can Branch Into Montgomery County*
Montgomery	Philadelphia
Philadelphia	Delaware
Delaware	Bucks
Bucks	Chester
Chester	Berks
Berks	Lehigh
Lehigh	

2. *Banks*

Banks	*Total Resources* (Thousands)
Continental Bank and Trust Company (Continental)	$376,522
Industrial Valley Bank and Trust Company (IVB)	196,865
Bryn Mawr Trust Company (Bryn Mawr Trust)	59,615
Peoples National Bank and Trust Company, Norristown (Peoples Norristown)	37,803
Cheltenham National Bank (Cheltenham Natl.)	34,203
Union National Bank and Trust Company of Souderton (Union Natl.)	29,357
Security Trust Company of Pottstown (Security Trust)	27,742
Bank of Old York Road (Old York Road)	26,941
Harleysville National Bank and Trust Company (Harleysville)	12,499
Peoples National Bank of Souderton (Peoples Souderton)	7,308
Elkins Park National (Elkins Park)	4,389

3. *Number of Banking Offices*

Montgomery County Banks (principal offices and branches)

Continental	13
IVB	8
Bryn Mawr Trust	2
Peoples Norristown	8
Cheltenham Natl.	6
Union Natl.	6
Security Trust	2
Old York Road	6
Harleysville	3
Peoples Souderton	1
Elkins Park	1
King of Prussia	1
	57

Philadelphia Banks (branches)

First Pennsylvania	5
PNB	12
Girard	9
Fidelity	6
Provident	5
Central-Penn	2
	39

Berks County Banks (branches)

Natl. Bank of Boyertown	1

E. Bucks County

1. *Branching Areas*

Bucks County Banks Can Branch Into These Counties	*Banks With Principal Offices In These Counties Can Branch Into Bucks County*
Bucks	Philadelphia
Philadelphia	Montgomery
Montgomery	Lehigh
Lehigh	Northampton
Northampton	

2. *Banks*

	Total Resources (Thousands)
Bucks County Bank and Trust Company (Bucks County)	$32,770
Doylestown National Bank & Trust Company (Doylestown Natl.)	29,725
Morrisville Bank (Morrisville)	21,567
Doylestown Trust Company (Doylestown Trust)	21,479
First National Bank and Trust Co., Newtown (First Natl.)	13,394
Quakertown National Bank (Quakertown)	13,372
Solebury National Bank, New Hope (Solebury)	9,800
Chalfont National Bank (Chalfont)	6,393

3. *Number of Banking Offices*

Bucks County Banks (principal offices and branches)		*Philadelphia Banks* (branches)	
Bucks County	4	First Pennsylvania	2
Doylestown Natl.	5	PNB	6
Morrisville	2	Girard	1
Doylestown Trust	1	Fidelity	6
First Natl.	2	Provident	2
Quakertown	4	Central-Penn	8
Solebury	1	Frankford Trust	2
Chalfont	2		
	18		27

F. Outlying Counties

1. *Chester County*

There are 13 banks in Chester County with aggregate total resources of $214 million. These banks are permitted to branch into Delaware, Montgomery and Berks Counties.

2. *Berks County*

There are 16 banks in Berks County with aggregate total resources of $618 million. These banks are permitted to branch into Montgomery, Chester and Lehigh Counties.

3. *Lehigh County*

There are 9 banks in Lehigh County with aggregate total resources of $406 million. These banks are permitted to branch into Montgomery, Bucks, Northampton and Berks Counties.

4. *Northampton County*

There are 17 banks in Northampton County with aggregate total resources of $461 million. These banks are permitted to branch into Bucks and Lehigh Counties.

G. Adjacent Communities

1. *Camden County, New Jersey*

There are 10 banks in Camden County with aggregate total resources of $596 million.

2. *Trenton, New Jersey*

There are 4 banks in Trenton with aggregate total resources of $485 million.

3. *Burlington County, New Jersey*

There are 14 banks in Burlington County with aggregate total resources of $248 million.

4. *Wilmington, Delaware*

There are 5 banks in Wilmington with aggregate total resources of $876 million.

OPINION AND ORDER OF DISTRICT COURT.

Dated October 13, 1966

Clary, *Ch. J.* October 13, 1966

On December 6, 1965 the Central-Penn National Bank of Philadelphia and the Provident National Bank of Philadelphia applied to the office of the Comptroller of the Currency for permission to merge under the charter of the Central-Penn National Bank and with the title of Provident National Bank. The report by the Board of Governors of the Federal Reserve System to the Comptroller of the Currency under Section 18(c) of the Federal Deposit Insurance Act on the competitive factors involved in the proposed merger dated January 7, 1966, was that "the overall effect of the proposed merger on competition would be significantly adverse." On the same day, the Attorney General of the United States reported, "There are strong reasons, therefore, for believing that the proposed merger would have an important adverse effect on competition within the Philadelphia banking market . . . the anticompetitive effects of this merger are important and considerable and there are likely to be no redeeming features." The Federal Deposit Insurance Corporation filed no comment.

On March 4, 1966 the Comptroller of the Currency approved the merger, and on March 31, 1966, filed his written decision in respect thereof. In that decision the Comptroller noted that this application to merge was the first filed by banks of significant size to be acted upon by this office since the passage of the 1966 Amendment to the Bank Merger Act. He stated, "The new law, passed by Congress to moderate the decisions of the Supreme Court in *U.S. v. Philadelphia National Bank, et al.*, 374 U.S. 321 (1963) and *U.S. v. Lexington*, 376 U.S. 665 (1964) recognizes that traditional antitrust concepts cannot be applied to banking without substantial modification." His findings then followed sustaining the merger.

On April 1, 1966 the present action brought by the United States of America against Provident National Bank and Central-Penn National Bank of Philadelphia, defendants, was filed to enjoin the merger. On April 7, 1966 James J. Saxon, Comptroller of the Currency, intervened and thus is a party to the action, as provided by Section 1828(c) (7) (D) of Title 12 United States Code. Since under the provisions of the afore-quoted Section 1828 of Title 12 a novel situation has been brought about wherein two departments of the Executive Branch of the Government are litigating one against the other, with the approval of the Congress of the United States, it will be necessary to delineate in this Opinion to which branch of Government is being referred. Consequently, for the purposes of this Opinion, the plaintiff hereafter will be referred to as "Department of Justice" or "Justice"; the defendant Provident National Bank as "Provident"; the defendant Central-Penn National Bank of Philadelphia as "Central"; the joint defendants as "Banks"; the Comptroller of the Currency as "Comptroller" or "Intervenor," and the Bank Merger Act, Public Law 89-356, 64 Stat. 892, will be referred to as "BMA-66." The stated purpose of the aforesaid Act, as set forth in the slip sheet publication reads as follows:

> "To establish a procedure for the review of proposed bank mergers so as to eliminate the necessity for the dissolution of merged banks, and for other purposes."

The pertinent pleadings to date which are essential to a decision on the present motions consist of a complaint filed by Justice, a joint answer filed by the Banks, the order permitting intervention of James J. Saxon, Comptroller of the Currency, answer of the Comptroller, motion of the Comptroller to dismiss, and motion of the Banks to dismiss. The basis for each of the motions to dismiss is that the complaint "fails to state a claim upon which relief can be granted."

There is no question that a law suit was started by Justice to enjoin the merger before the thirtieth calendar day after the date of approval by the agency (March 4, 1966). Thus, Justice has met the fundamental requirement of BMA-66, Title 12, Section (c) (7) (A), which prohibits any litigation challenging the merger after the thirtieth calendar day following approval. Justice has met the statutory limitation of action in that regard. A reading of the complaint leaves no doubt that Justice intended to plead, and did plead, a case of antitrust violation strictly in accordance with Section 7 of the Clayton Act (15 U.S.C., Section 18) and has attempted to ignore completely BMA-66. There are too many pointed references in the complaint challenging all alleged violations of antitrust law as contravening Section 7 of the Clayton Act only. Justice bottoms its case on the decision of the Supreme Court in *U.S. v. Philadelphia National Bank, et al.*, 374 U.S. 321 (1963). It is this specific pleading of Justice charging a violation of Section 7 which is relied upon by the Banks and the intervening Comptroller in their motions to dismiss. The Banks and Comptroller insist that a Section 7 action is no longer available to Justice in a merger or consolidation of the type involved in the instant case, and that any actions must be grounded in BMA-66 and no other statute in the light of the wording of BMA-66. The Banks and Comptroller urge that since Justice has failed to ground its action in a challenge under BMA-66 within the thirty day period, and that since such failure is substantive rather than procedural, the limitations contained in BMA-66 are applicable, that the Court is thus without jurisdiction, and the action must be dismissed. In plain language they insist that Justice has deliberately sought to avoid any requirements contained in BMA-66 which deletes "line of commerce" and adds another facet to the standards governing bank mergers, i. e. if anti-competitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served, the agency in question

is authorized to approve a proposed merger. This intransigence of Justice, they contend, is substantive, not procedural, and thus fatal to the position of Justice.

The weakness of the contentions of the Banks and of the Comptroller lies in the fact that we are now only at the notice pleading stage. The complaint specifically charges that the history of commercial banking in the four-county area of Philadelphia has been one of consolidations, mergers and acquisitions, with a heavy concentration of the business of commercial banking within a relatively few banks; that Provident controlled 9% of the total assets, 9% of the total loans, 9% of the total IPC deposits, 10% of the total IPC demand deposits, and 9% of the banking offices doing business in the four-county area; that Central-Penn, the sixth largest commercial bank in the four-county area, controlled 5% of the total assets, 5% of the total loans, 5% of the total IPC deposits, 5% of the total IPC demand deposits, and 6% of the banking offices doing business in the four-county area; that Provident is the product of seven mergers or consolidations since 1947, and Central-Penn is the product of six such mergers or consolidations since 1949; that the proposed merged bank would be the fourth largest bank in the area, controlling 14% of the total assets, 14% of the total loans, 14% of the total IPC deposits, 15% of the total IPC demand deposits, and 15% of the banking offices of 36 banks doing business in the four-county area. Also, Justice contends that after the proposed merger, the five largest banks in the area would control 78% of the total assets, 79% of the total loans, 76% of the total IPC deposits, 77% of the total IPC demand deposits, and 63% of the banking offices of 36 banks doing business in the area; that it would destroy competition between each other and other banks, and that it would substantially lessen competition or tend to create a monopoly. It also charges that competition generally in the commercial banks in the four-county area will be substantially and unreasonably lessened, and that concentration in commercial banking in

the four-county area will be substantially and unreasonably increased.

It cannot be gainsaid that if Justice had seen fit to plead generally and without reference to any particular statute, instead of specifically proceeding under Section 7 of the Clayton Act, and these factors pleaded might result in a violation of antitrust laws, the Court would of necessity have to hear the case. The only question for decision then is, does the reference solely to Section 7 invalidate the cause of action filed by Justice? For reasons hereafter set forth, this Court decides that it does not.

The purpose of notice pleading is merely to inform opposing parties what such opposing parties have to meet and defend. Justice charges a violation of antitrust laws, despite its insistence upon Section 7. Thus, suit is brought under antitrust laws of the United States.

The reference to a statute as being the basic ground upon which an action is brought, even if completely incorrect, is no ground for the dismissal of an action where there is a statute in existence which would warrant a valid cause of action for which relief could be granted upon the facts as pleaded. *Missouri K. & T. R. Co. v. Wulf*, 226 U. S. 570 (1913). This case involved a complaint based upon a state statute which had been repealed by the enactment of a federal statute not mentioned in the complaint. Mr. Justice Pitney, writing for the Court, held that the Court was presumed to be cognizant of the enactment and that the pleader was not required to refer to the federal act. He further stated that reference to the state statute no more vitiated the pleading than a reference to any other repealed statute would have done. It was only important that there were sufficient allegations to support an action under the new federal act.

The modern theory of notice pleading is one of even greater liberality, thus bolstering the decision reached in *Missouri K. & T. Co. v. Wulf*, supra. Today, the basic principle is that pleadings are no longer to be held to the rigid standards of the common law and neither absolute clarity

nor absolute precision is required. *United States v. Crown Zellerbach Corporation,* 141 F. Supp. 118 (N. D. Ill. 1956). It is enough to sustain a pleading against a motion to dismiss that a defendant is informed with reasonable particularity of a legally cognizable claim against him. If the plaintiff could recover on any state of facts, which it might prove in support of its allegations as laid, a motion to dismiss will be denied. *Conley v. Gibson,* 355 U. S. 41 (1957); *Melo-Sonics Corporation v. Cropp,* 342 F. 2d 856 (3 Cir. 1965); *Fuller v. Highway Truck Drivers & Helpers Local 107,* 233 F. Supp. 115 (E. D. Pa. 1964); *Miller v. Bargain City, U. S. A., Inc.,* 229 F. Supp. 33 (E. D. Pa. 1964).

Therefore, today the legal averments of a pleading are not so important as long as there are allegations which, if proved most favorably to plaintiff, would permit recovery under the laws of the United States. If, in such a complaint, there also appears a reference to an irrelevant statute, or if no statute is mentioned, the Court need only take judicial notice of the relevant statute. As stated in *Buell v. Sears, Roebuck & Co.,* 321 F. 2d 468 (10 Cir. 1963), it is not necessary to plead what may be judicially noticed. And, it is hornbook law that federal acts are a proper subject for judicial notice.

There is a further principle of pleading which has been recognized in federal procedure since *United States v. Morris,* 23 U. S. 246, 6 L. Ed. 314 (1825), that a subsequent pleading of an adversary, if not thereafter denied, may cure a defect in a prior pleading. *Cole v. Ralph,* 252 U. S. 286, 40 S. Ct. 321, 64 L. Ed. 567 (1920); *Albertson v. Federal Communications System,* 87 U. S. App. D. C. 39, 182 F. 2d 397 (1950); *Bullen v. DeBretteville,* 239 F. 2d 824 (1956). This principle applies to substantive as well as procedural omissions.

In the first defense of their answer, defendants claim that any action lies only under BMA-66. In their second defense, the defendant Banks put into controversy the question as to whether all right of Justice to enjoin the merger is vested in BMA-66. The answer of the Comptrol-

ler likewise puts into controversy the Bank Merger Act of 1966 by its prayer for relief.

We have long passed the stage peculiar to common law pleading that a failure in form of pleading vitiates the entire proceeding. This is an important case to all and is not a private quarrel between two branches of the Executive Department. The Congress of the United States has, for the first time, permitted two co-ordinate branches of the same department of Government to litigate opposite views in a judicial proceeding, thus affording one department of the Executive Branch, aggrieved by an alleged arbitrary position of the Department of Justice, to properly present for the first time before the judicial side of the Government its contention when it is in violent disagreement with the Department of Justice. While quite novel, in view of increasing differences between departments of Government, the provision is undoubtedly necessary.

In denying the motions to dismiss at this time, the Court does not sustain the position of Justice that it is entitled to sue under Section 7 of the Clayton Act. The only suit open to Justice to enjoin a bank merger lies solely within the ambit of BMA-66. It is not necessary at this time to decide the question of burden of proof, whether on Justice or on the Comptroller and Banks. That will be ruled upon in later pre-trial procedures.

ORDER

AND NOW, to wit, this 13th day of October, 1966, for the reasons set forth in the foregoing Opinion, it is ORDERED, ADJUDGED AND DECREED that defendants' Motion to Dismiss and intervenor's Motion to Dismiss be and they are hereby DENIED.

BY THE COURT:

Thomas J. Clary
Ch. J.

OPINION AND ORDER OF THE DISTRICT COURT ISSUED NOVEMBER 4, 1966.

The first question to be resolved is how much weight is to be given to the findings of the Comptroller. In the recent case of *U. S. v. Crocker Anglo National Bank*, the Court, in answer to this question, declared its intention to apply the substantial evidence test to the Comptroller's public interest findings, calling the "convenience and needs" test of BMA-66, Section 5 (B) non-judicial in character. Yet, Crocker would also apply the substantial evidence test, with less vigor, to the Comptroller's findings on competition.

Crocker, however, is distinguishable from the case at bar, and it is distinguishable on one fact. In Crocker the findings of the Comptroller were based on a public, evidentiary hearing which produced 1605 pages of testimony and exhibits. There was no such hearing in the instant proceeding. Therefore, although the Crocker holding rules the instant case as a Court review of an agency decision, the question of scope of review comes under the rule of *First National Bank of Smithfield, North Carolina v. Saxon*, 352 F. 2d 267 (4 Cir. 1965).

Smithfield involved a branch bank approval under 12 U. S. C. Section 36 in which the Comptroller approved a new branch without a hearing. The Court first held that a hearing was not required because 12 U. S. C. Section 36 made no provision for one. A hearing is only required when expressly directed by the empowering statute. Then, after this determination, the Court declared that weight is only to be given to the Comptroller's decision if after a Court hearing in law and in fact it is found that his decision rested on an exercise of discretion. This is because the Court will not substitute its discretion for the Comptroller's.

This Court finds Smithfield to be analogous to the instant case. The BMA-66, like 12 U. S. C. Section 36, has no requirement for a hearing before the Comptroller, thus

allowing the Comptroller to act at his discretion. However, when there is no hearing, it cannot be contended that the findings of the Comptroller should be given the weight of hearing based findings.

The basis for this conclusion is best seen in the following quote from Smithfield:

> "We have said the Comptroller did not act arbitrarily in not allowing a hearing. However, a necessary consequence of his unilateral procedure is that the facts on which the Comptroller presumably acted should not be given the preferred position accorded by the substantial-evidence rule. The rule would declare them indisputable if some reasonable basis for them may be found in the evidence. Applied here, the plaintiff would be bound by evidence offered in a proceeding in which it was not heard. Hence, there is no place in the review for an opening-presumption of correctness of any fact which it may appear to the Court was adopted by the Comptroller for his decision."

The substantial evidence rule, therefore, may be invoked only when a proper foundation is laid for it as was done in Crocker.

Therefore, the Court will hear all evidence in law and in fact, and if after it has made its findings, it then appears that the decision of the Comptroller is dependent on an exercise of discretion, the Court will bow to that discretion. However, if from the fact findings, it appears that the Comptroller abused, exceeded, or arbitrarily applied his discretion, the Court will set it aside.

The other question requiring answer is how is the burden of proof to be allocated? However, this Court's decision that Justice's only action lies within the ambit of BMA-66 allows only one solution. The allocation is as follows.

Justice must prove a violation of BMA-66, Section 5(B). To show this violation, Justice has to prima facie

establish (1) that there are anticompetitive effects, as defined in Section 5(B) and (2) that these anticompetitive effects are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. Only such a showing will make out a case for violation of BMA-66. Proof of anticompetitive effects solely is no longer controlling. A merger may be anticompetitive and yet be legal because it promotes the public interest as set forth in the Act. Therefore, for Justice to show illegality, it must prove first that a merger is not only anticompetitive, but also prima facie that it is not in the public interest.

If and when Justice establishes such a prima facie violation of BMA-66, the burden of producing evidence will shift to the Banks and the Comptroller to counter the Justice Department's proof. Once the Banks and Comptroller have presented their case, Justice will be given an opportunity to rebut such matters as are raised by the Banks and Comptroller in regard to the convenience and needs test. In any event, however, Justice has the overall burden of persuasion to show the illegality of the merger.

* * * *

PLAINTIFF'S IDENTIFICATION OF WITNESSES, SUMMARY OF EVIDENCE, AND STATEMENT OF POSITION

Plaintiff intends to sustain its burden of proving a prima facie case through two witnesses, Professor Donald R. Hodgman, Department of Economics, University of Illinois; and Professor Joel B. Dirlas, Department of Economics, University of Rhode Island. The expected testimony of these witnesses will be supported by relevant documentation introduced through the witnesses or approved for introduction into evidence by stipulation between the parties:

I

Witnesses and Summary of Expected Evidence

(1) *Professor Hodgman*

Professor Hodgman will be qualified as a national and international authority on monetary, fiscal and economic matters, with a background including the following:

University Professor in Economics; Seminar Instructor to banking personnel; Research Fellow on banks and finance by reason of grants from universities, the Bank of America, the National Science Foundation, The Merrill Foundation for Advancement of Financial Knowledge, Inc., and the Ford Foundation; Book Review Editor, Quarterly Review of Economics and Business, Bureau of Economic and Business Research, University of Illinois.

In 1963 Professor Hodgman became Associate Editor of the Journal of Finance, official journal of the American Finance Association. He is the author of numerous works on monetary and banking activity and policy, appearing in leading publications of the country. He is a member of the American Economic Association, The Econometric Society, and The American Finance Association.

Professor Hodgman has just recently returned from a year's leave of absence in Europe in connection with a comparative study of the instruments and processes of monetary policy in England, France, Germany and Holland.

The substance of Professor Hodgman's testimony, it is expected, will be essentially as follows:

Commercial banks offer their customers an extensive and functionally interconnected set of financial services which distinguishes them from all other financial institutions and necessarily circumscribes the geographical market within which commercial banks can effectively and profitably render such services.

Such services, keyed to commercial banks' unique position within the nation's system of payments, include the following: Commercial banks serve as depositories for checking and savings accounts, as sources of credit and loans of all kinds, as fiduciary agents for trusts and estates, registrarships, corporate trusteeships, pension fund trusteeships, and as advisors and counselors on securities and investments, financial statements, reconciliation of accounts, financial markets, trends in industry and tax matters. Commercial banks also participate indirectly, if not directly, in management problems of concerns by performing bookkeeping and cost accounting services, billing customers and administering payrolls. These services in combination operate to create complex "full service" customer relationships between commercial banks and their customers.

The services aspects of the business done by Provident and Central-Penn, aside from their other characteristics identifying them as commercial banks, earmark the banks as being engaged in a separate "line of commerce" within an area reasonably described as the four-county area of Philadelphia, Bucks, Delaware and Montgomery, State of Pennsylvania.

(2) *Professor Dirlam*

Professor Dirlam will be qualified as an authority on Government control of industry and public utility regulation which include industrial organization, with a background including the following:

University Professor in Economics; Consultant to the First Michigan Bank and Trust Company, to the Michigan Bankers Association, to the International Bank for Reconstruction and Development, to the Attorney General of Michigan, and to the Antitrust Division, United States Department of Justice, with respect to a variety of banking matters. He testified as an expert witness for the Antitrust Division, United States Department of Justice, in the Crocker-Anglo Bank case.

Professor Dirlam is the Review Editor for The Engineering Economist. He is the author of numerous works pertaining to industrial market structure, regulation and competition.

The substance of Professor Dirlam's testimony, it is expected, will be essentially as follows:

Concentration is high among commercial banks (hereinafter some times referred to simply as "banks") doing business in the four-county area of Philadelphia, Bucks, Delaware, and Montgomery Counties, Pennsylvania. This concentration rests to a large degree on a merger trend that has existed in the four-county area since December 31, 1945. Between December 31, 1945 and December 31, 1960, 72 banks disappeared through merger or acquisition in the four-county area, with only two new banks entering upon the scene during the period. These 72 banks held assets of $1,841,500,000, deposits of $1,659,200,000, and loans of $615,800,000. In the five-year period following, December 31, 1960 to December 31, 1965, ten more banks disappeared through the same route, with only two new banks coming into existence. These ten banks held assets of $281,200,000, deposits of $250,500,000,

and loans of $132,100,000. The following table illustrates in different perspective the impact of this concentration trend:

Commercial Banks doing Business in the Four-County Area	*1945*	*1960*	*1965*
Number of Banks	115	45	37
Number of Banking Offices	176	280	379
Total Assets	$4,484,400,000	$6,027,600,000	$8,136,200,000
Total Deposits	$4,108,400,000	$5,306,100,000	$7,085,300,000
Total Loans	$ 632,600,000	$2,926,400,000	$4,657,000,000

Since the filing of this case on April 1, 1966, still two more banks have gone out of existenee by way of merger, with assets in the aggregate of $35,225,000, deposits of $31,166,000, and loans of $17,106,000.

Concentration has been particularly noticeable in the five largest banks doing business in the four-county area, as testified to by the following table:

5 Largest Commercial Banks in Four-County Area	*1945*	*1960*	*1965*
Percentage of Banking Offices of all Banks doing Business in the Four-County Area	15.3%	52.5%	57%
Percentage of Total Assets of all Banks doing Business in the Four-County Area	51%	71.6%	73.1%
Percentage of Total Deposits of all Banks doing Business in the Four-County Area	51.8%	71.7%	73.1%
Percentage of Total Loans of all Banks doing Business in the Four-County Area	53.9%	72.3%	73.9%

The growth history of the present five largest banks has been to a significant degree, one of absorption and acquisition

of other banks. In the 20-year span, December 31, 1945 to December 31, 1965, these banks have acquired banks with assets totaling $1,725,500,000 (or 45% of the present five largest banks' growth in assets over the period), deposits totaling $1,556,000,000 (or 45% of the present five largest banks' growth in deposits over the period), loans totaling $604,600,000 (or 19.2% of the five largest banks' growth in assets over the period), and 118 banking offices (or 60.2% of the present five largest banks' growth in banking offices over the period).

Both Provident and Central-Penn have contributed substantially to the merger trend within the four-county area. Since 1947 Provident has acquired seven banks in the four-county area with assets in the aggregate of $411,943,000, deposits of $358,288,000, loans of $185,099,000, and 21 offices. The assets, deposits, and loans of these seven acquired banks equaled 57%, 57%, and 45% of Provident's assets, deposits, and loans as of December 31, 1965. Since 1949 Central-Penn has acquired six banks in the four-county area with assets in the aggregate of $89,994,000, deposits of $83,878,000, loans of $27,629,000, and 14 offices. The assets, deposits, and loans of these six acquired banks equaled 24%, 25%, and 13% of Central-Penn's assets, deposits, and loans, as of December 31, 1965. Both Provident and Central-Penn have attempted unsuccessfully to acquire several other banks in the four-county area during this period.

As of December 31, 1965, Provident, the 5th largest commercial bank in the four-county area, controlled approximately $723,300,000 (9%) of the total assets, $627,100,000 (9%) of the total deposits, $412,100,000 (9%) of the total loans, and 32 (8%) of the banking offices of the 37 banks doing business in the four-county area.

As of December 31, 1965, Central-Penn, the 6th largest commercial bank in the four-county area, controlled approximately $377,500,000 (5%) of the total assets, $333,000,000 (5%) of the total deposits, $218,300,000 (5%) of the total loans, and 24 (6%) of the banking offices of the 37 banks doing business in the four-county area.

The proposed merger would produce a bank controlling an undue percentage share of the relevant market (four-county area) and result in a significant increase of concentration of commercial banks in the area. After the proposed merger the resulting bank would become the 4th largest in the area. It would control approximately 14% of the total assets, 15% of the total deposits, 14% of the total loans, and 15% of the banking offices of the 36 remaining banks doing business in the four-county area. After the merger, the five largest banks in the area would control 77.7% of the assets, 77.8% of the deposits, 78.6% of the loans, and 63.3% of the offices held by the 36 remaining banks operating in the area.

The four-county area of Philadelphia, Bucks, Delaware and Montgomery Counties, Pennsylvania, is the relevant market in which to assess the effects of the merger. The majority of the banks' customers and the dollar amount of the banks' business originate within the four-county area.

Of their total number of depositors, at least 95% for Provident and 98% for Central-Penn are located in the four-county area.

Of their total number of depositors, at least 95% for Provident and 98% for Central-Penn are located in the four-county area. Of their total number of borrowers, at least 97% for both Provident and Central-Penn are located in the four-county area. In terms of dollar amounts, 82% of Provident's and 88% of Central-Penn's deposits, and 58% of Provident's and 83% of Central-Penn's total loans originate in the four-county area.

As Provident and Central-Penn are competing with each other in the four-county area, the proposed merger would eliminate all competition, existing and potential, between them.

II

Statement of Position

On November 4, 1966, the Court ruled on the issue of the weight, if any, to be given by the Court to the decision of the

Comptroller approving the proposed merger of Provident and Central-Penn, and on the issue of plaintiff's burden of proof. The Court ruled as follows:

> "...... the Court will hear all evidence in law and in fact, and if after it has made its findings, it then appears that the decision of the Comptroller is dependent on an exercise of discretion, the Court will bow to that discretion. However, if from the fact findings, it appears that the Comptroller abused, exceeded, or arbitrarily applied his discretion, the Court will set it aside.
>
> . . . .
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> "Justice must prove a violation of BMA-66, Section 5(B). To show this violation, Justice has to prima facie establish (1) that there are anticompetitive effects, as defined in Section 5(B) and (2) that these anticompetitive effects are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. Only such a showing will make out a case for violation of BMA-66. Proof of anticompetitive effects solely is no longer controlling. A merger may be anticompetitive and yet be legal because it promotes the public interest as set forth in the Act. Therefore, for Justice to show illegality, it must prove first that a merger is not only anticompetitive, but also prima facie that it is not in the public interest.
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> "If and when Justice establishes such a prima facie violation of BMA-66, the burden of producing evidence will shift to the Banks and the Comptroller to counter the Justice Department's proof. Once the Banks and Comptroller have presented their case, Justice will be given an opportunity to rebut such matters as are raised by the Banks and Comptroller in regard to the convenience and needs test. In any event, however, Justice has the overall burden of persuasion to show the illegality of the merger."

This statement of plaintiff's position is not an attempt to reargue these issues, upon which the Court has ruled; its purpose is to explain, briefly, some of the reasons for the absence of any reference, in the foregoing summary of expected evidence, to "convenience and needs of the community," and any corollary effect this might have on the weight to be given to the Comptroller's decision.

Plaintiff respectfully submits, as it has throughout these proceedings, that the offense charged is one under Section 7 of the Clayton Act, and, therefore, that the case should be tried and an adjudication should be made on the basis of whether or not there is a violation of Section 7.

In phrasing the ultimate issue in this way, plaintiff does not mean to suggest that the Bank Merger Act of 1966 has no relevance to this lawsuit. Plaintiff recognizes that the Bank Merger Act of 1966 establishes standards to be applied by the banking agencies in approving or disapproving proposed mergers, and that these same standards are to be applied by the courts in passing on the legality of bank mergers under Section 7 of the Clayton Act. Section 7, however, has not been displaced by the 1966 Act; rather Section 7 is to be applied by the Courts in light of the standards of the 1966 Act.

There is no suggestion in the 1966 Act that approval of a bank merger by a regulatory agency is to be accorded any presumption of regularity, or any special weight. The 1966 Act does not provide a statutory scheme for judicial review of agency action; hence, it should not be plaintiff's burden in this case to establish that the Comptroller acted arbitrarily, or that he abused his discretion.

It is true that the statutory scheme thus requires the Court to determine *de novo* all of the issues raised by Section 7 and by the Bank Merger Act of 1966, including the question of whether the anticompetitive effects of the merger are clearly outweighed by its probable effect in meeting the convenience and needs of the community. But we do not believe that the latter issue imposes on the Court a uniquely

difficult task. We submit that the plain purpose and the legislative history of the Act indicate what Congress intended as the weighing process required by the 1966 Act. We now consider that purpose and history.

In 1963 the decision of the Supreme Court in the *Philadelphia National Bank* case resolved preexisting doubts as to the application of the antitrust laws to bank mergers. In affirming that the antitrust laws did apply, however, it uncovered two major problem areas. The first had to do with the extent to which the courts should take into consideration the peculiar importance of safeguarding bank solvency and viability which is the primary concern of the bank supervisory agencies.[1] Second involved the question whether the courts and the banking agencies would apply the same standards in reviewing bank mergers. (This problem was a very real one in light of the record of the banking agencies in approving over 90% of the merger applications presented to them under the 1960 Act.)

The purpose of the 1966 amendment was to provide answers to these questions. This amendment makes clear that the banking agencies, in reviewing mergers under the Act, and the courts, in actions under the antitrust laws, are to apply the same standards. In evaluating the competitive effects of a proposed merger antitrust standards are to be applied, but the agencies and the courts are directed also to "take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served." The amendment also makes clear, however, that the probable competitive effect of a merger is to be given the greatest weight, since it provides that a merger which may substantially lessen competition may be justified only

1. Although the Court's opinion strongly implied that it would consider such "banking factors" and expressly stated that "the so-called failing company defense . . . might have somewhat larger contours if applied to bank mergers because of the greater public impact of a bank failure compared with ordinary business failures" it also pointed out that these issues were not raised in the case then before it.

where such anticompetitive effects are clearly outweighed by its probable effect in meeting the convenience and needs of the community. As the House Report on the Bill pointed out, this is a standard stricter than that applied by the banking agencies under the original Bank Merger Act.

In our view, the considerations likely to meet this heavy burden are principally those relating to the public interest in bank solvency and viability. This stress on the unique importance of solvency and viability is supported by two major arguments.

In the first place, these are the only factors specifically mentioned in the statue itself, i.e., "the financial and managerial resources and future prospects of the existing and proposed institutions." And, considerations relating to solvency and viability were the factors emphasized in the legislative history of the Act when Congress discussed the meaning of convenience and needs of the community.

Secondly, it is this public interest in bank solvency and viability which peculiarly distinguishes banking from other segments of the economy.[2] It is that interest which is the basic rationale for bank regulation. By the same token, factors which have no relationship with this concern for bank solvency and viability do not warrant greater weight in determining the legality of bank mergers than they would receive in merger cases in other industries.

The task of weighing the anticompetitive effects of a bank merger against its possible effect in meeting this "public concern to safeguard the viability of the banking system"

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2. As the Comptroller of the Currency pointed out in his 102d Annual Report, "Underlying this intercession of government in banking is a basic public policy that sets this industry clearly apart from others. The factor which distinguishes banking from other industries is the public concern to safeguard the viability of the banking system." And more recently, "There is but one consideration of the public interest which can be made the basis for restrictions over banking activities—that is the necessity to maintain the solvency and liquidity of banks." (Remarks of James J. Saxon, Comptroller of the Currency, before the National Bank Division, American Bankers Association, October 24, 1966.)

is similar, though admittedly not identical, to the task the courts have always performed in applying the so-called "failing company doctrine" in Section 7 cases. And, as the courts have consistently held in such cases, it is the defendants who have the burden of coming forward with evidence on this issue. For it is plainly the defendants, and not the Government, who are in the best position to know whether the merger meets problems of bank solvency and viability, whether in the particular case such problems are substantial, and whether the merger is essential to their solution. By the same token, whatever other factors might appropriately be regarded as "convenience and needs," it is clear that the banks proposing to merge would be in a peculiarly superior position to advance them as warranting the merger. Hence, the statute undoubtedly intended the merging parties to have the burden of coming forth with this evidence.

Moreover, we note that even if the Bank Merger Act of 1966 required plaintiff to show that the Comptroller had abused, exceeded, or arbitrarily applied his discretion in finding that the anticompetitive effects of the merger were outweighed by its probable effect in meeting the convenience and needs of the community, the decision of the Comptroller in the present case contains no findings or conclusions on this issue. The Comptroller's opinion (pp. 17-18) mentions only three ways in which the merger will affect "the convenience and needs of the Philadelphia market:" the increased lending capacity of the resulting bank which it is said will benefit large banking customers through the creation of an additional source of very large loans; the combining of the computer systems of the applicant banks to yield a more efficient data processing operation; and the use of the recently renovated Provident main office by the resulting bank which it is said will increase its efficiency, improve customer service and eliminate the necessity of a substantial outlay by Central-Penn to obtain adequate headquarters. None of these factors appears to be related to the questions of bank solvency and viability which, as we have shown above, were the primary

concern of Congress in amending the Bank Merger Act. Moreover, the Comptroller's opinion nowhere discusses the substantiality of these alleged benefits of the merger, whether they could be attained by other methods, or, since he finds no adverse effect on competition, the ultimate question of whether they would clearly outweigh the merger's anticompetitive effects. Thus, even under the defendants' reading of the statutory scheme, the Comptroller's decision presents no issue of weighing anticompetitive effects against convenience and needs of the community as to which plaintiff should be required to come forward with evidence.

For the foregoing reasons plaintiff does not intend, in establishing a prima facie case, to offer proof either of the existence or the significance of "convenience and needs" factors, if any there may be. Plaintiff reserves the right, however, to offer in rebuttal evidence with respect to any such factors, should it become necessary to do so.

Respectfully submitted,

JULIUS JAY HOLLIS
JOSEPH L. DWYER
Attorneys, Department of Justice

Dated: November 26, 1966

DEFENDANT BANKS' MOTION FOR FINAL JUDGMENT.

The defendant Banks move the Court for a final judgment in their favor such as would be entered at the close of the plaintiff's evidence if the plaintiff failed to make out a prima facie case. The Banks are making this motion at this time instead of awaiting the close of the plaintiff's case at trial because the plaintiff, in its statement of position filed November 28, 1966, has unequivocally stated that it does not intend to establish a prima facie case under the Bank Merger Act of 1966 and this Court's ruling of November 4, 1966, in that it will not offer proof either of the existence or significance of convenience and needs factors. Postponement of the Court's decision until trial will not alter the issues or the positions of the parties and will cause unnecessary delay in final ruling on the defendant Banks' merger, which has already been postponed eight months.

The judgment which the Banks are seeking by this motion is the same as would be entered upon a motion for dismissal after completion of the plaintiff's case, and would therefore operate as an adjudication on the merits under Rule 41(b). The Banks are asking the Court to enter judgment now instead of reserving its decision until all parties have put in their evidence because this is the only way to obtain a clear cut test of the position taken by the Department of Justice; namely, that "it should not be plaintiff's burden in this case to establish that the Comptroller acted arbitrarily, or that he abused his discretion."

The plaintiff's contention, set forth in its statement of November 28, is that the Department of Justice can block a bank merger approved by the Comptroller without offering evidence as to the convenience and needs of the community and "any corollary effect this might have on the weight to be given to the Comptroller's decision." The Department has refused to allege or to prove that the merger is not in the public interest. It has sought to force upon the Banks

the burden of proving a second time to the Court what they have already proved once to the Comptroller, i.e., that the merger meets the convenience and needs of the community to be served.

On November 4 this Court ruled against the Department as to the burden of persuasion, and also as to the burden of producing evidence. The Department's statement of November 28 shows that it is willing to put its case at stake in order to obtain review of that ruling. If this Court were to reserve its decision on the instant motion, the effect would be partially to reverse the Court's order of November 4 by forcing the Banks to come forward with evidence which on November 4 this Court said the Department of Justice was required to produce.

The grounds for this motion are:

1. On December 6, 1965 the Banks filed with the Comptroller of the Currency their application for approval of their proposed merger. The application was filed pursuant to Section 18(c) of the Federal Deposit Insurance Act as amended by the Bank Merger Act of 1960. Exhibit A to this motion is a copy of the application, verified by affidavits of the Banks.

2. On January 7, 1966 the Board of Governors of the Federal Reserve System and the Department of Justice filed with the Comptroller their reports on the competitive factors involved in the merger as required by Section 18(c) of the Federal Deposit Insurance Act. Exhibits B and C to this motion are, respectively, copies of the Federal Reserve report and the Department of Justice report.

3. On February 21, 1966 the Bank Merger Act of 1966 became effective. Among other things, it completely rewrote Section 18(c) of the Federal Deposit Insurance Act. It established new standards to be applied by the Comptroller in passing upon the merger application and provided that in any judicial proceeding attacking the merger the standards applied by the court shall be identical

with those that the Comptroller was directed to apply. These standards are contained in clause (5) of Section 18(c), which reads as follows:

> "(5) The responsible agency shall not approve—
>
> "(A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or
>
> "(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served."
>
> "In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served."

4. After the issuance of the advisory reports and the enactment of the Bank Merger Act of 1966, the Banks supplied to the Comptroller supplementary material relating to the comments in the Federal Reserve report and the newly enacted statute, verified copies of such material being contained in Exhibit D to this motion.

5. On March 31, 1966 the Comptroller issued his decision approving the Banks' application to merge. He found that the proposed merger "clearly conforms to the statutory criteria," i.e., the standards prescribed by the Bank

Merger Act of 1966. Exhibit E to this motion is a copy of the Comptroller's decision.

6. On April 1, 1966 the Department of Justice filed its complaint against the defendant Banks, seeking an injunction under the Clayton Act. The complaint made no reference to the Bank Merger Act of 1966. Thereafter, the Comptroller intervened to defend his decision as provided by the Bank Merger Act of 1966.

7. On June 7, 1966 the Court entered Pre-Trial Order No. 1, directing the parties to file detailed written briefs setting forth the facts which they expected to prove in support and defense of each claim for relief and the legal issues, contentions and supporting authorities relating thereto, including their contentions as to burden of proof. The order also directed the plaintiff to file a detailed written reply brief setting forth the facts, if any, which plaintiff expected to prove in rebutting any affirmative matter raised in defendants' brief. Exhibits F, G and H to this motion are, respectively, copies of pretrial briefs of the plaintiff and the defendants and the reply brief of the plaintiff.

8. The plaintiff's pretrial brief took the position that the Banks had the burden of proving that any anticompetitive effects of the merger are clearly outweighed in the public interest by its probable effect in meeting the convenience and needs of the community to be served. The defendants' pretrial brief took the position that the plaintiff had the burden of showing wherein the Comptroller acted arbitrarily or capriciously or exceeded the bounds of his discretion in striking a balance between competition and public interest. The defendants' brief also set forth at length the facts which the Banks expect to prove in support of their claim that their merger is in the public interest. The plaintiff's reply brief did not set forth any rebuttal to these facts. It stated that plaintiff "is not in a position to inform

this Court whether plaintiff believes the conclusions reached [in paragraphs 3.9 through 3.21 of the Banks' brief] are correct or not" (paragraph 21 of plaintiff's reply brief).

9. On November 4, 1966 the Court made the following ruling:

> "Therefore, the Court will hear all evidence in law and in fact, and if after it has made its findings, it then appears that the decision of the Comptroller is dependent on an exercise of discretion, the Court will bow to that discretion. However, if from the fact findings, it appears that the Comptroller abused, exceeded, or arbitrarily applied his discretion, the Court will set it aside.
>
> "The other question requiring answer is how is the burden of proof to be allocated? However, this Court's decision that Justice's only action lies within the ambit of BMA-66 allows only one solution. The allocation is as follows.
>
> "Justice must prove a violation of BMA-66, Section 5(B). To show this violation, Justice has to prima facie establish (1) that there are anticompetitive effects, as defined in Section 5(B) and (2) that these anticompetitive effects are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. Only such a showing will make out a case for violation of BMA-66. Proof of anticompetitive effects solely is no longer controlling. A merger may be anticompetitive and yet be legal because it promotes the public interest as set forth in the Act. Therefore, for Justice to show illegality, it must prove first that a merger is not only anticompetitive, but also prima facie that it is not in the public interest.
>
> "If and when Justice establishes such a prima facie violation of BMA-66, the burden of producing

evidence will shift to the Banks and the Comptroller to counter the Justice Department's proof. Once the Banks and the Comptroller have presented their case, Justice will be given an opportunity to rebut such matters as are raised by the Banks and Comptroller in regard to the convenience and needs test. In any event, however, Justice has the overall burden of persuasion to show the illegality of the merger."

10. On November 28, 1966 the plaintiff filed its "Identification of Witnesses, Summary of Evidence, and Statement of Position," stating (a) that "it should not be plaintiff's burden in this case to establish that the Comptroller acted arbitrarily, or that he abused his discretion" and (b) that "plaintiff does not intend, in establishing a prima facie case, to offer proof either of the existence or the significance of 'convenience and needs' factors, if any there may be." Exhibit I to this motion is a copy of said document.

11. The questions posed by this motion are purely legal in nature. They depend upon the meaning of the Bank Merger Act of 1966 in the light of the Constitutional separation of powers. They do not depend upon the resolution of any disputed issue of fact. Against the background of the facts which the Banks set forth in their merger application and offered to prove in their pretrial brief, the Department of Justice has deliberately staked its case on its interpretation of the statute. Wherefore, the defendant Banks submit that a final judgment should now be entered in their favor.

Frederic L. Ballard
Attorney for Defendants

Dated: December 2, 1966

DEFENDANT BANKS' LIST OF PROSPECTIVE WITNESSES WITH SUMMARIES OF THEIR TESTIMONY.

INTRODUCTORY STATEMENT

On October 26, the Court fixed a schedule (later extended) for the filing by the parties of lists of witnesses and short outlines of their testimony. On November 4, the Court entered an order with respect to the burden of proof. On November 28, the plaintiff filed its outline of testimony, together with a statement that it did not intend to undertake the burden of proof assigned to it in the Court's order. On December 2, the defendant Banks filed their motion for final judgment by reason of the plaintiff's announced failure to establish a prima facie case. This outline of testimony is being filed while the motion for judgment is under consideration by the Court.

In preparing this outline, the Banks have been hampered by the fact that the plaintiff has consistently failed to identify the issues in the case. Plaintiff did not take issue with the Comptroller's findings as to the beneficial effects of the merger on competition with larger banks and in meeting the convenience and needs of the community. Nor did the plaintiff take issue with any facts stated in the application and supplementary information submitted by the Banks to the Comptroller. Nor has the plaintiff rebutted the Banks' statements in their prerial brief as to the facts they expect to prove in support of their case.

As a consequence of plaintiff's position, no issues have been framed except as to the validity of the plaintiff's statistics on market shares and concentration and the conclusions to be drawn therefrom. The following outline sets forth the testimony which the Banks will introduce with respect to those statistical issues. Additionally, it covers the testimony which the Banks were prepared to offer in support of the Comptroller's findings if plaintiff had

elected to challenge those findings. In submitting this additional outline, however, the Banks are not withdrawing from the position taken in their motion of December 2. They reiterate their request for an immediate final judgment which will operate as an adjudication on the merits.

The Banks also reiterate the position taken in conference with the Court; namely, that if the Court were to deny the Banks' motion for judgment or reserve decision until after a full trial, and if the case were then to be tried on the basis of the plaintiff's interpretation of the Bank Merger Act of 1966, the Banks should be given wide latitude in introducing evidence to assist the Court in deciding whether the merger is in the public interest. Such evidence would follow in general the outline set forth below, but would of necessity include additional textual material and testimony directed at the broad questions of policy involved in bank mergers.

Moreover, the Banks submit that if the Court is considering denial of the motion for judgment or reservation of its decision thereon, it would be appropriate to require the plaintiff to file promptly an outline of the testimony plaintiff would offer in rebuttal to the positions taken by the Banks in their application to the Comptroller, their pretrial brief and this outline. Plaintiff should not be permitted to disregard the Court's wish that the issues be framed in advance of trial.

For the foregoing reasons, and because the Banks do not know what testimony the Comptroller is proposing to introduce, the Banks respectfully reserve the right to enlarge the testimony of the witnesses listed below and to call additional witnesses if the Court decides that the case should be tried at this time.

Appended hereto is a table of the Banks' witnesses, followed by outlines of their experience and testimony.

Frederic L. Ballard
Attorney for Defendants

Dated: December 14, 1966

OUTLINES OF WITNESSES' EXPERIENCE AND TESTIMONY.

A. Bank Personnel

James M. Large—Chairman of the Board, Provident National Bank

Experience

Joined Tradesmens National in 1928. Advanced through several positions to President in 1947. Remained President through successive mergers until merger with Provident in 1957, when he became Chairman of the Board.

Testimony

Full service banking includes (a) services for individuals—specialized deposit accounts, consumer loans, single payment loans, trust services, foreign services, electronic data processing ("EDP") services, mortgages—all available at convenient branches; (b) services for businesses—deposit accounts, ARP, lock box and other accounting and EDP services, unsecured loans (both short and long term), mortgages, corporate trust, pension and profit sharing, financial counseling; (c) accounting, EDP and other services for financial institutions (in addition to loans and deposits); (d) a full line of services for other banks; (e) services for municipal units comparable to those performed for business customers.

Full service banking has developed in Philadelphia largely through mergers, combining the skills and specialties of constituent banks. Provident is an example: consumer credit department combines elements from Tradesmens, Land Title, and Provident Trust; construction loan, largely from Land Title; international and foreign banking, from Tradesmens; trust services from Provident Trust; commercial lending, largely from Tradesmens; retail branch system, partly from smaller banks.

Bank mergers in Philadelphia have produced better service and more competition, as shown by history since 1928, when PNB was by far the largest. Traditionally, national banks and state trust companies specialized in different fields. National banks' historic function was clearing and collection of checks and making unsecured short-term self-liquidating loans to finance commercial transactions. Trust companies made very few unsecured loans. Thus the two groups were complementary rather than competitive. Mergers between them have created modern institutions (First Pennsylvania, Girard, Fidelity, Provident) which compete with PNB. It is significant that all four are built around a former trust company. A large trust department contributes to income, attracts new business and retains old business.

Competition from country banks is also an important factor. Large units created by recent mergers have advantages in branching areas and reserve requirements. They are aggressive and successful.

Development of retail branch banking is also important. Began in 1950's as banks in city followed customers to suburbs. Suburban customers include not only individuals, but also light industry and research laboratories (industrial parks), school districts, municipal authorities, and other municipal and educational units. First Pennsylvania (then Pennsylvania Company) was an early leader. Provident and Tradesmens did not move as fast.

Present status of Philadelphia banks: First Pennsylvania, PNB, Girard are leaders in various fields. Some fields dominated by New York banks. Merged bank will not be the largest in any field.

In comparison with other cities, Philadelphia area has numerous small banks and a lack of large banks. Many smaller cities have larger banks. No other city has as many evenly matched banks at the top. This will be even more true after the merger.

Competition with banks from other cities is intense. New York, Pittsburgh and other banks solicit in Philadel-

phia. Provident solicits in other cities. Competition is largely in providing services. In many fields, larger banks give more specialized service because they can afford expert personnel. This is particularly true of New York banks.

The Provident—Central-Penn merger will permit more specialization, will improve service and enhance competition. It has received support from Pennsylvania legislators, Philadelphia City officials, and Philadelphia newspapers.

William G. Foulke—President, Provident National Bank

Experience

Investment banking (E. B. Smith & Co.) before 1938. Then joined Brown Brothers. In 1940 joined Provident Trust in banking department. Moved to trust department in 1945, special business investment unit in 1950, in charge of Trust Division 1957, Executive Vice President 1960, and President in 1962.

Testimony

Provident Life and Trust founded in 1865. The trust business was separately incorporated in 1922. The bank undertook development of commercial business after World War II, development of retail branches by merger and de novo in mid 1950's.

Branch development was delayed by merger with Tradesmens. A 1962 survey by First Research Corporation showed need for many more branches. Despite subsequent addition of six branches through Second National merger and eight de novo, system still has substantial gaps.

Branch system is necessary to retain and attract the business of individuals who want to bank at locations convenient to home or place of business. This has brought commercial banks into competition with mutuals and savings and loans. Branches are also necessary to attract and retain local businesses, schools, governmental units and

other institutions. Complete branch coverage is needed to get full benefit from regional advertising, to retain customers who move within four-county area, and to serve those who have outlets throughout the area.

Philadelphia banks are severely restricted in branching by the four-county limitation. Natural tendency would be for them to branch into other parts of Delaware Valley. Branching limitations do not reflect economic or banking market. They protect country banks from city competition. They do not restrict large Montgomery County banks to same degree.

De novo branching is costly and there is a scarcity of suitable locations. This is why country banks command premium in merging with city banks. Merger with Central-Penn involves no premium, no duplication of branches.

Commercial banks are important source of trust services, compete with lawyers and individual trustees. The merger will improve the quality of trust services available through Central-Penn branches. Provident has unusual experience in handling small trust accounts such as those that typically are generated in branches. It provides more specialized services in this field, an example being its investment services, which include six common trust funds, estate planning, tax and administrative services. Provident also has a separate department for the administration of substantial interests in close corporations and family businesses held in trusts of which it is trustee.

Provident's experience following the mergers with First National Bank of Delaware County and Second National Bank of Philadelphia shows that there is great need for increased trust services through branch offices. Many individuals who should have these services are not even aware of their existence. A competent staff is essential for proper trust administration, and there is an acute shortage of qualified trust personnel. The merged bank would be better able to attract and retain such personnel and thus to meet this need.

Merger will also improve quality of service and competitive effectiveness in correspondent banking. First Pennsylvania and PNB are Philadelphia leaders in this field; their correspondent balances are five times those of Provident, ten times those of Central-Penn.

City banks perform many services for their country correspondents in addition to the traditional clearing and collection. These include the investment portfolio administration, loan participations and advice, trust advice and international services. A recent innovation is EDP services, for which Provident has three customers, Central-Penn one, and larger banks many more. Provident also offers a unique cost control program, which is used by about 35 banks. Services offered by larger banks but not by Provident or Central-Penn include U. S. Treasury and municipal bond trading and underwriting, the making of an active market in Federal funds, and availability to correspondents of pension and insurance programs. The merged institution, with larger correspondent balances, would be in a better position to provide these services. It could also expand its portfolio analysis for correspondent banks. The combination of Provident and Central-Penn EDP equipment and programs would improve services to customers of both banks.

The improvement and broadening of services to correspondents will affect the quality of banking services and banking competition in communities throughout the whole area in which the banks now have correspondents; i.e., Pennsylvania, New Jersey, Delaware, Maryland, District of Columbia and Virginia.

In the correspondent field, larger banks have many advantages: more sending points, more resources for large transactions, more extensive foreign services. Also, their greater volume of transactions permits more specialization. There is remarkably little overlap between correspondent business of Provident and Central-Penn. Merger will be substantial step toward catching up with First Pennsylvania and PNB.

Merger will also improve services in other fields, to be discussed by other witnesses: retail services (Randolph); EDP services (Carr); business and construction loans (Hillas); consumer loans (Still); foreign banking (Weber).

On broader scale, merged bank will do more for community, will provide more institutional programs like "Provident Forums" (discussions of important national and international issues by leading speakers), will have more personnel available for charitable and civic enterprises, can play bigger part in municipal finance and financing of cultural, educational and civic projects. A billion dollar bank can underwrite projects which lesser institutions could not even consider. This is important to economy of Philadelphia and the Delaware Valley.

Banking is not static. There has been gradual expansion in branching authority for Pennsylvania banks. A commission is studying further expansion. Also, there have been movements to enlarge functions of mutuals to include consumer loans and other banking functions, with proposed legislation in Congress to permit conversions of savings institutions. All these point to large and more versatile institutions and more vigorous competition.

Banking is on brink of new and revolutionary developments such as the checkless society, automated transfer of funds locally, nationally and internationally. Merged bank will be able to play a bigger part in these developments,

Philadelphia's central position in eastern "megalopolis," with increasing speed and ease of communication, transportation and redevelopment of the Port and the City, holds great promise of growth and will increase competition in all businesses, including banking. Increasing costs of new equipment, such as jet planes and helicopters, equipment for the space age, and atomic energy installations will require larger and more complex financing. These developments will break down barriers between financial centers in this country and abroad. Banks which are to compete in these new markets will have to have resources at least as big as the merged institution.

William B. Carr—Executive Vice President, Provident National Bank

Experience

Various capacities with General Electric, 1945-51. Joined Provident Trust in 1951 as Comptroller. Moved to Vice President and Comptroller, then Senior Vice President, Operations Division. Became Executive Vice President in 1964.

Testimony

Mr. Carr is in charge of operations—meaning the running of the bank's internal business—the largest department of the bank. Operations includes check handling, accounting, bookkeeping, audit, trust operations (at Provident, not at all other banks). Also, accounting and financial services to bank's customers.

Operations have been greatly affected by improvements in systems and equipment in last 10 years which have accelerated transfers of funds, enabled banks to handle more transactions faster with fewer employees, pay better salaries, provide better services and maintain or reduce charges.

Also, machines have made business of small customer more profitable, an example being trust operations. Bank which can afford to automate these operations can profitably handle small trusts.

Provident and Central-Penn both offer quite wide variety of customer services, each offering some which the other does not offer. Thus, present customers of each bank will have wider choice after the merger.

Competition in this field is not limited to Philadelphia banks. Includes other Pennsylvania and out-of-state banks, service bureaus, and suppliers selling or renting equipment to the banks' customers.

Operations are increasingly dependent on computers, which are costly to acquire and to operate, must be operated near capacity to pay for themselves. Also the develop-

ment of programs for computers is expensive and time-consuming. Larger banks can afford to devote specialists to this work on a full-time basis.

Provident has computerized—or is now computerizing—all major operations. Central-Penn is not so far advanced. Provident's experience with other mergers shows that combination can effect major economies. Projections in this merger show savings of more than $1.5 million a year in salaries, equipment expense, general expense, occupancy costs, and accelerated availability of funds.* Major areas of saving in handling Central-Penn business are automation of consumer credit, trust operations, and transit operations and improved lock box, loan and collection procedures. Additional savings are to be expected from more intensive use of computers.

Also, the larger bank will be able to afford the kind of operations research that has led to development of such services as credit cards, ARP, lock box service, ready reserve accounts, and freight payment plans—all developed by leading banks. The merged institution cannot promise that it will develop a major innovation, but it will be in a much better position to do so.

Mr. Carr is also generally responsible for personnel and will testify as to the keen competition in recruitment.

Harold F. Still, Jr.—President, Central-Penn National Bank

Experience

Federal Reserve Bank of Philadelphia in 1946. Joined Central-Penn 1948. Served in Commercial Loan Division, Business Development Department, on Operations Committee, and later as Assistant to the President. Became President in January 1963 and chief executive officer in December 1965.

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* Because these projections were not complete when merger application was filed, they are not reflected in Schedule V thereto.

Testimony

Modern history of Central-Penn stems from 1930 merger of Central National and Penn National. The resulting bank was a commercial bank in true sense of the word, serving largely commerce and industry.

In 1950, consumer lending was added through merger with Charter Bank. This division has grown substantially. Commercial loan portfolio has also grown. These are two major fields of bank's activities today. Central-Penn has one of largest portfolios of automobile dealer paper among banks in Philadelphia. While Provident also has substantial amount of automobile dealer paper, it is not in significant competition with Central-Penn. Central-Penn mostly finances local dealers on a non-recourse basis. Provident finances dealers outside four-county area (and often outside Pennsylvania) on a recourse basis.

Central-Penn's traditionally strong position in commercial banking brought it many customers of regional and national size—as well as many smaller businesses. Approximately 50% of its deposits and more than 50% of its loans are with companies who can easily do all or most of their banking in other cities. [This figure is based on criteria used by Judge MacMahon in *Manufacturers-Hanover*, supplemented by review of larger accounts.]

Recent changes in banking and competition have affected Central-Penn's business. Banks can no longer count on obtaining funds through demand deposits and lending them out on a short-term, self-liquidating basis. Corporations have reduced demand deposits. In some cases they have converted to interest-bearing deposits, which increase the bank's costs. In others they have become suppliers of credit in competition with banks. Commercial loans have tended to become longer in term, more complicated and less liquid.

Rising costs mean bank will have to automate and increase volume in order to achieve economies. Change in loan portfolio means bank will have to attract and provide

more highly-trained and specialized lending officers. Both these changes require a larger capital cushion.

Consumer lending has also become less profitable. Central-Penn encounters competition especially from finance companies and First Pennsylvania. This competition, together with rising money costs, has lowered profit margins. Here, also, solution is a heavy investment in equipment to automate the consumer credit operations and achieve economies which would permit more effective competition. In consumer field this means lower rates for borrowers. Likewise, more automation should permit lowering of service charges.

Increased automation and savings in operating costs from merger (pointed out by Carr) will help to solve problems in both commercial and consumer lending.

Another reason for merger is to broaden the line of services offered by the bank. Customers expect the full line available at larger Philadelphia and New York banks. Examples: accelerated check collections, complicated credit arrangements, financial guidance, EDP services, trust services, pension and profit sharing trusts, international services, corporate trust. The demand for full service is not confined to the larger customers in the national and regional market. Even small and medium-sized companies want to have these services available in case of need. Central-Penn must meet these expectations on the part of its customers or see them drift away to other banks. Some have taken substantial portions of their business to other banks where such services are available. After the merger, Central-Penn's business customers will have available the services of Provident's large and specialized commercial department (to be described by Hillas).

School districts and other municipal units are operating on a bigger scale and demand more sophisticated services comparable to those demanded by substantial businesses. They also expect their banks to purchase their bonds, which are being sold in larger issues.

Development of specialized services is dependent on volume—having enough transactions of any given kind to warrant having an expert. Central-Penn does not have sufficient volume. Also, its earnings are not sufficient to enable it to hire high-priced, expert personnel in competition with larger banks which are more heavily capitalized and have better earnings (primarily from trust departments) and can spend money to develop an expert staff.

Prestige is also a factor. Small businessmen like to deal with large banks. Large businesses like to deal with banks that are considered leaders in their communities. Country banks like to have large banks for their correspondents. Business and community leaders like to serve on boards of large banks. While merged bank will still be only fourth in size in Philadelphia, it will be three times the size of Central-Penn and, as a "billion dollar" bank, its stature will be greatly enhanced.

Central-Penn needs a larger trust department which will attract and retain business and operate at a profit commensurate with its larger competitors. The merger will solve this. Central-Penn also needs a very much larger international department. Even after merger much work will remain to be done to achieve competitive parity with PNB and First Pennsylvania in international field.

In the field of EDP, Central-Penn felt it could not afford to take the lead and is now finding it expensive to catch up. Again, this presents a drain on capital. Yet economies from automated operations and the income from EDP services are becoming more important in earnings of commercial banks. Also essential in retaining correspondent bank and commercial business. Merger with heavily-capitalized Provident provides an answer.

Before merger was negotiated, Central-Penn had begun exploration of ways of raising additional capital and obtaining additional office space and perhaps a new head office. Both of these will be solved by the merger.

The developments outlined above are reflected in Central-Penn's earnings, which have, in general, been the least

satisfactory of the Philadelphia reserve city banks. In order to break even, Central-Penn requires a higher yield on its loans and investments than the other banks. Resultant lower earnings have depressed stock prices.

Central-Penn must move forward if it is to satisfy stockholders and maintain a first-rate staff. Would have to double in size just to catch nearest competitor (Provident), assuming that Provident did not grow in the meantime. Such a change in "order of magnitude" can't be expected in ordinary course. Growth through retained earnings is slow. De novo branching is limited by law and expensive. Merger with country banks is not attractive because of stock prices and premiums demanded by country banks. Merger with Provident provides best solution because of complementarity in capital, fields of specialty, and branch systems.

The combined bank could offer better service and compete more effectively in retail banking, trusts, complex term financing, correspondent banking, foreign and international business, EDP services and the business of regional and national concerns.

Merged bank will also be in much better position to attract corporate deposits through the issuance of negotiable certificates of deposit in competition with New York, Chicago and California banks. In this field, the value of the certificate is based on the credit of the issuing bank. Many large companies will not buy a certificate issued by a bank as small as Central-Penn. While neither Provident nor Central-Penn have used this device extensively in the past, the ability to do so in the future may be of great importance to assure the merged bank that it will have funds available to meet the needs of its customers.

Important to note that competition among banks is in field of service to customers more than for isolated deposits and loans. A customer who maintains deposit balances expects that his borrowing needs will be fulfilled. A bank which meets a customer's needs for funds expects to

receive his deposits. More and more the relationship is further dependent on a full line of services rendered or available from the bank to its customers. Central-Penn's merger with Provident is a response to the need for more complex and sophisticated service to retain and attract customers.

Roger S. Hillas—Executive Vice President, Provident National Bank

Experience

Joined Provident executive development program in 1951. Served in Special Business Investment Department from 1954 through 1962, becoming Vice President in charge of the Department in 1960. Moved to Commercial Division in 1962 and became Executive Vice President in charge of this Division in 1964.

Testimony

Provident's commercial division has about 175 people. The national group in its metropolitan department serves customers and seeks additional customers as far south as Florida and as far west as Chicago. Representatives visit these cities on a regular basis three or four times a year. Approximately 60% of Provident's total deposits and 70% of its loans are accounted for by customers of the national group and other customers who are not limited to Philadelphia banks. These proportions are based on the criteria laid down by Judge MacMahon in the *Manufacturers-Hanover* case, and have been confirmed by a review of Provident's large deposits and loans.

Another important department within the commercial division is construction loan. Personnel includes three full-time field inspectors. Procedures provide disbursement on vouchers directly to trade creditors of contractor. These assure the owner that he is getting what he pays for. Can be used by small builders, small companies building plant facilities, and even individual homeowners. Central-Penn's services are much more limited.

Most customers of commercial division deal with more than one bank. This gives them access to broader lines of credit. Also enables them to compare services. When multiple-line customer needs substantial financing, it is usually arranged through bank extending largest line—the "lead bank." The lead bank works out the details (often complex). Other banks merely participate. Being lead bank enables bank to develop expertise. This is helpful even to small customers, many of whom present complicated situations needing all the expertise demanded by large financings. If Philadelphia banks can improve their reputation for handling complex financing, that will help attract new businesses and new ventures to Philadelphia.

Opportunity to be lead bank depends largely on size of lending limit. Provident, with comparatively large limit among Philadelphia banks, arranges substantial number of complex financings—many more than Central-Penn. Merged bank would do more. Also, merged bank would be better able to hold lead position against New York banks. As customers grow, New York banks tend to take lead position in financing, then they tend to take over completely in pensions, corporate trust and other relationships.

New York banks have pre-eminent position in pension and profit sharing and corporate trust. Latter aided by requirements of stock exchanges. These specialties give New York banks advantage in soliciting corporate customers.

The commercial division constantly encounters competition from New York, Pittsburgh, and other larger banks. They offer package financing, staffs of experts and specialized technical services. Provident itself has developed specialties: acquisition and disposition of businesses, construction lending, securities transactions, certain railroad technicalities. Larger volume of business in merged bank should make possible the development of additional skills. This should encourage the growth of local economy.

David S. Randolph—Vice President, Provident National Bank

Experience

First employed in 1945 at Market Street National Bank where he became a Vice President. Following the merger of Market Street into Tradesmens Land Title in 1955 and the Provident-Tradesmens merger in 1957, Mr. Randolph was appointed Manager of Provident's Market and Juniper branch, the former head office of Market Street National. He was given charge of all Delaware County branches in 1958, and of the entire Branch Administration Division in 1962.

Testimony

Retail banking is increasingly important as banks derive a larger proportion of their deposits from their branches. City banks need extensive branch systems to enable them to follow their customers and compete effectively. Both Provident's and Central-Penn's systems contain large gaps which would be filled in large measure by the proposed merger. In addition, the combination of the two banks will lead to economies in advertising and marketing techniques and thereby strengthen their competitive position.

Most customers choose a branch on the basis of convenience. Examples are individuals who bank near their residence or place of employment. Small and medium-sized businesses also bank by convenience, particularly where a nearby depository for cash receipts is required. A principal convenience factor is travel time—by automobile in the suburbs, and by foot or public transportation in the city. Thus, branch customers tend to be clustered near the branch convenient to them. An inconvenient branch has little chance of obtaining their business.

It is possible to determine, by plotting customer locations, the primary service areas of branches. Because of the

importance of the convenience factor, branches whose service areas do not overlap are not in competition.

As indicated earlier, Provident and Central-Penn's branch systems are uniquely complementary; and this fact was pointed out by the Banks in their application to merge. Thereafter, in its advisory opinion, the Federal Reserve Board singled out several pairs of Provident and Central-Penn branches which the Board said were in competition. At that time, Provident retained First Research Corporation, Miami, to delineate primary service areas for the branches in question. First Research's report, which found substantially no overlap, confirmed the Banks' position. Since then, First Research has delineated primary service areas for virtually all the branches of the two banks. As appears from these maps, the overlap of the systems of the two banks is miniscule.

Commercial banking branches compete vigorously with many other financial institutions for retail business. For example, they compete with mutual savings banks, savings and loan associations and credit unions for savings deposits. Historically, United States Government savings bonds were also an important factor, and they could become important again in the future. On the loan side, commercial banks compete increasingly with small loan, finance, and consumer discount companies and credit unions for personal loans and with the mutuals and S&Ls for mortgages. Every Provident and Central-Penn branch has numerous competing financial institutions located within and adjacent to its service area. In most of the areas served by Provident and Central-Penn branches there are more financial institutions today than there were when the branch was established or acquired.

The proposed merger will bring better facilities and services to the customers of Central-Penn's branches. Apart from the specialized services in the trust, construction loan, and other fields which have been described by other witnesses, Provident's substantial staff organized

entirely to serve the branches enables it to give specialized training and assistance to branch personnel which Central-Penn's limited organization does not now provide. Provident has a branch profitability accounting system which, when installed at the Central-Penn branches, will enable them to improve efficiency. While both banks strive to provide personalized service, Provident has placed somewhat more emphasis than Central-Penn on delegation of authority (particularly lending authority) at the branch level. This delegation promotes innovation and more imaginative service to customers.

An important improvement in service to small and medium-sized business customers of Central-Penn will be Provident's decentralized lending authority system. Under this program, branch managers have lending authority within specified limits which enables them to approve loans on the spot. In addition, larger loans can be approved immediately by regional managers without the necessity for contacting the main office. Finally, loans up to $250,000 can be made by the branch administration division without further credit approval by Provident management.

Provident's belief that services at the branch level will be improved by the proposed merger is borne out by its experience in past mergers. Example is the growth in trust business in the Delaware County branches after they were acquired by Provident, showing a large need which was not appreciated by the customers until the trust services were offered on a more personalized basis. Another example is the availability of industrial and commercial mortgage loans to former customers of Second National, which did not make loans of this kind.

Each branch or regional group of branches serves the nearby community and meets competition from banks and branches in the same neighborhood. In cases where Provident acquired branches by merger, the services and facilities have been improved and the competition with other banks in the neighborhood has increased since the acquisition.

Erwin Weber—Vice President, Provident National Bank

Experience

Before 1926, worked in large German commercial bank, then in foreign department of Irving Trust Company in New York, where he became head of the foreign credit department in 1941 and head of the foreign trade information service in 1947. Joined Tradesmens Land Title in 1955, became head of International Division of Provident Tradesmens (now Provident National) in 1957.

Testimony

Services of Provident international division include letters of credit and acceptance; financing for imports, exports, goods in transit, overseas investments and foreign investments in this country; remittances and collections; foreign exchange, assistance in foreign trade development, foreign investments and government programs.

Provident personnel maintain contacts in the United Kingdom, Switzerland, Common Market nations, Scandinavian countries, Near East, Hong Kong, Philippines, Japan, Australia and New Zealand. Larger bank would have wider coverage.

Provident has relationships with numerous foreign banks in the principal countries of the free world. These banks are often much larger than banks in U.S. They prefer to deal with large American banks. Merged bank would be more acceptable to them.

New York banks have tremendous advantage in the international and foreign field by reason of their size and reputation. They do the vast bulk of the business in this field, followed by banks in Chicago and on the West Coast. They make important foreign loans, which attract collateral banking business. Even the largest Philadelphia banks are small in the international field when compared with New York.

Provident has a small Edge Act corporation—a subsidiary which can invest in foreign equities as well as make loans. This operation also requires skill and experience, which are developed by larger banks. An Edge Act corporation allows the bank more flexibility in serving U.S. customers with foreign interests. Expansion of Provident's Edge Act subsidiary would help retain such customers in Philadelphia and attract other potential customers in this area who now seek assistance elsewhere.

A trade development program is operated by Provident to encourage exports, particularly through Philadelphia port. Representatives call on firms and country banks throughout eastern Pennsylvania. Encouraged by Department of Commerce. Program is expensive. Larger bank after merger could do more of it.

B. Other Witnesses

Frederic A. Potts—Chairman of the Board, Philadelphia National Bank

Experience

With Dominick and Dominick and later J. W. Davis & Co., investment bankers, 1926-41, having become a partner of latter in 1928. Joined PNB in 1941, became President 1947 and Chairman of the Board and chief executive officer 1964. Chairman, Greater Philadelphia Chamber of Commerce, Southeastern Pennsylvania Economic Development Corp., Citizens Advisory Committee of the Community Renewal Program, and Commissioners of the Sinking Funds, City of Philadelphia; Director, Greater Philadelphia Movement, Food Distribution Center, Old Philadelphia Development Corporation, Philadelphia Industrial Development Corporation, United Fund of Philadelphia Area, and University City Science Center.

Testimony

A city's banks are important in attracting and retaining businesses, particularly large businesses, and those of

an entrepreneurial nature which have complex financial needs. The size of the banks plays an important part in this. People expect larger banks to have more experience—also larger staff of experts and specialists. Philadelphia banks are small by comparison with New York, Pittsburgh, Boston and other cities. This has contributed to the static reputation of Philadelphia in the eyes of the business community. Creation of larger banking units would improve Philadelphia's reputation and help improve its economy. This was one of the basic reasons for proposed merger of PNB and Girard.

The Provident—Central-Penn merger will improve the standing of the Philadelphia banks as a group in comparison with the banks of other cities. The combination of Central-Penn's experience in traditional commercial lending and consumer-lending and Provident's skills in trusts, construction lending and specialized financing will make a truly competitive full-service bank.

The merged institution will be able to compete more intensively with PNB. This has been the result of other mergers in the past, notably Girard Trust-Corn Exchange and Pennsylvania Company-First National. The full-service, billion dollar banks that resulted from these mergers have provided competition for PNB at every level. One major reason is their ability to hire qualified personnel. Banks must bid for graduates of colleges and business schools against all other employers. There aren't enough candidates to go around. Large banks which can make best use of modern cost saving methods and equipment can pay higher salaries. Also, they offer the chance to specialize—to become an expert—which is an added attraction.

The mergers which created IVB and Continental were also pro-competitive in the sense that the resulting institutions are more capable and aggressive than their components were before the merger. The businessman, promoter, developer, financier or investor who needs expert and sophisticated bank services has a wider choice in Philadel-

phia today than he did 10 years ago or 20 years ago. The Provident–Central-Penn merger will improve the situation still further.

The economy of Philadelphia has been lagging in recent years. A number of head offices of substantial businesses have been lost through merger and otherwise. Also, the number of jobs has not grown as fast as the population. The Southeastern Pennsylvania Development organizations were formed to attract and retain business in the Philadelphia area—particularly growing businesses which will supply new jobs. These businesses, although they are small, often have complicated financial needs. They do not have specialized personnel on their own staffs and must rely on their banks for expert information, advice and service. The merged bank will be better able to fill this need.

The Port Corporation and Science Center represent other efforts to improve the Philadelphia economy. Studies show that the best chance of achieving such improvement lies in port-oriented and science-oriented enterprises. Both these kinds of business need specialized banks. It takes a large international and foreign department to provide international and foreign banking services on a scale competitive with New York. As for science, it takes experience and expert personnel to evaluate the financial needs and prospects of these businesses. The Philadelphia Port competes directly with the New York Port. One of the advantages of New York is its ability to offer banks with the largest foreign and international connections in the country. The merger will be a step toward putting Philadelphia on a competitive par.

Bertram W. Zumeta—Economist, Philadelphia Electric Company

Experience

Graduate of Franklin & Marshall College, A.B.; graduate studies in economic statistics at University of Pennsylvania. Instructor in Statistics at the University of Pennsyl-

vania 1946 through 1959, interrupted for military service through the years 1951 to 1953; Associate Economist, Federal Reserve Bank of Philadelphia, August 1959 to 1961; Economist, Federal Reserve Bank of Philadelphia, 1962 through July, 1966. Lecturer in Economics, Rutgers University (University College) 1949-1951; Research Statistician, The Institute for Cooperative Research, University of Pennsylvania, 1954-1958; Lecturer in Statistics, University of Pennsylvania (Wharton School and Wharton Graduate Division) 1959-1963.

Author of numerous articles in "Business Review" published by Federal Reserve Bank of Philadelphia; also: "What Attracts Growth Industries?" in New Jersey Business magazine, April, 1965

Articles in special supplements to Philadelphia Evening Bulletin:

Three articles reviewing regional economic developments and prospects, in the "Year-end Review" section, January 1963, 1964, 1965

Article describing diversified economy of the Philadelphia area, in special financial analysts' supplement, May, 1965

Chapters 2, 9 and 10 of THE PROJECT ENGINEER, University of Pennsylvania, The Institute for Cooperative Research, Philadelphia, 1956.

Testimony

For a considerable number of years, the economic growth of the Philadelphia Standard Metropolitan Statistical Area has lagged behind the growth in many other metropolitan areas and in the nation as a whole. The major and most reliable evidence of this condition is in employment growth, which has been much less in the Philadelphia area than in the nation.

Studies by the Federal Reserve Bank of Philadelphia and The Greater Philadelphia Movement identified the fol-

lowing factors aggravating the economic problems of the Philadelphia area: deficiencies in skill, training and motivation of the labor force, failure to attract and stimulate growth of science-based firms through assistance in financing and otherwise, neglect of possibilities for stimulating economic development by certain governmental units; failure to overcome the reputation that Philadelphia is somewhat old-fashioned and unaggressive in its ways of doing business. Banks can assist in countering Philadelphia's lagging economy by supporting the development in the area of science-based firms of a growth nature. Larger banks are in a better position to accomplish this, because their size permits specialization of lending personnel.

John H. Frazier—Director of Port Development, Delaware River Port Authority

Experience

Worked in grain business and U. S. Department of Agriculture. Served as Managing Director of the Commercial Exchange of Philadelphia. Joined Delaware River Port Authority, 1953; became Director of Division of Port Development, 1957.

Testimony

The Delaware River Port Authority was created by a Compact between the Commonwealth of Pennsylvania and the State of New Jersey. This Compact charges the Authority with the responsibility of "promoting the Delaware River as a highway of commerce."

The Authority through its Division of Port Development prepares and distributes literature, maps, motion pictures and articles on the advantages of the Delaware River Ports; conducts a media advertising program in trade journals and newspapers; collects, tabulates and publishes port statistics; and maintains seven regional offices for the solicitation of cargo through the Ports of Philadelphia. These

offices are located in Philadelphia, New York, Pittsburgh, Chicago, Washington, London and Brussels.

The Port of New York is Philadelphia's greatest competitor, in fact it occupies a dominant position among ports with 1/3 of the nation's foreign general cargo. New York's annual general cargo volume is in the neighborhood of 16 million short tons, three to four times the volume handled at Philadelphia. General cargo makes a much larger contribution to the local economy than bulk cargo because of related activities such as stevedoring, warehousing, transportation and packaging.

In competing for general cargo, Philadelphia's representatives are constantly reminded by shippers of the greater availability of various ancillary services for foreign traders in New York. One such service, particularly important in connection with general cargo, is that of banking establishments with international departments. Availability of financing arrangements has a direct bearing on the port chosen for import or export.

While New York has at least fifty banks with international departments, Philadelphia has less than a half dozen, none of which is truly competitive with the giants in New York. According to the 1965 New York Port Handbook (page 142), "Over 70 percent of the international commerce of the United States is financed by banks in this (New York) district."

Merging Central-Penn with Provident National should improve Provident's services because it will provide greater resources in a single institution. As a rule, the larger banks have more international contacts and can provide service to the large tonnage shippers.

The handling of port tonnage provides employment for thousands of workers. It has been estimated that each ton of general cargo produces over $16 in direct revenue to a port area. Merger of Central-Penn with Provident should assist in producing more cargo for the Philadelphia Port and provide an additional sales tool in our campaign for a

more equitable share of the cargo moving through North Atlantic ports.

William Zucker—President, Southeastern Pennsylvania Development Fund and Southeastern Pennsylvania Economic Development Corporation

Experience

1940-41, interned with National Institute of Public Administration. 1941-43, administrative officer Labor Division—War Production Board. 1943, administrative management specialist, Brewster Aircraft Company. 1944, auditor, Price Waterhouse and Company. Secretary, Commerce and Industry Association, 1944-1959. Vice-President, Downtown-Lower Manhattan Association, 1959-1964. Joined Southeastern Pennsylvania Development organization in 1964.

Testimony

The Southeastern Pennsylvania Development Fund and the related Corporation were formed to meet the need for more businesses and more jobs in the economic community centering on Philadelphia, and to stem or compensate for the loss of business which has occurred in the area in recent years. Its efforts to date have centered upon small businesses, many of them in the early stages of development.

Despite the fact that these businesses are small in size, they tend to need specialized and imaginative financial advice and financing such as only larger banks with specialized and expert personnel can provide. Particularly true of the Negro community. Among the Philadelphia banks, Provident is one of the leaders in this kind of complex financing. However, the ability of any bank to handle matters of this kind is limited by the financial and personnel resources available to it. The merger with Central-Penn will make greater resources available to Provident, and this

in turn should enable Provident to expand its specialized financing. There can be no doubt that this would facilitate the efforts of the Southeastern Pennsylvania Development organizations and help the economy of Philadelphia and the surrounding areas.

Richard J. McConnell—Executive Vice President, Philadelphia Industrial Development Corporation

Experience

Served as certified public accountant and in other financial capacities with accounting firm, industry and the Treasury Department, 1940-53. Served with City of Philadelphia in Department of Finance, 1953-61, becoming Director of Finance in 1956. Served with PIDC from 1962 to present.

Testimony

PIDC was organized to attract and retain business in Philadelphia by assisting companies to obtain adequate space and in the financing of industrial real estate. The reason for its formation was the critical need of Philadelphia to retain and create more jobs. Originally emphasis of PIDC was on retaining manufacturing jobs. Today the emphasis is on retaining and expanding Philadelphia's industry as well as bringing new companies into Philadelphia.

Most PIDC transactions are financed—at least partially—through commercial banks. These are not traditional short-term self-liquidating loans. Rather, they are long-term loans of considerable complexity.

Efforts to recruit new businesses for Philadelphia are sometimes hampered by a feeling that it is a small town in some of its services. Commercial banks are part of this reputation. Some businessmen feel that they are too small to provide the kind of advice and assistance that modern

businesses need. Regardless of truth, this reputation is hard to overcome.

Merger of Provident and Central-Penn should help this situation. The Philadelphia area is one of the great metropolitan centers of the country and is one of the world's great industrial areas. Modern and expanding industry requires modern and expanding services and facilities. There are emerging and expanding major industrial firms in Philadelphia which need substantial additional resources and services from the banking community. The merged bank will have more resources to finance businesses. Also, the creation of another billion dollar bank will help to establish Philadelphia as a major financial center.

J. A. Livingston—Financial Editor, Philadelphia Evening Bulletin

Experience

Columnist and executive editor of New York Daily Investment News, 1931-34; public utilities editor of Financial World, 1934-35; economist for Business Week, 1936-42. Served with War Production Board and Office of War Mobilization and Reconversion, 1942-45.

Author of column "Business Outlook" and financial editor of Philadelphia Record, 1945-47. Economic columnist for Washington Post in 1947. Financial editor of The Philadelphia Bulletin since 1948. Author of numerous articles and publications.

Testimony

Job of the financial editor, among other things, is to observe and report on financial community in Philadelphia, including commercial banks.

Banking is a qualitative business. The benefits to the community depend on the quality of service—the imagination and intelligence of the officials in banks—rather than the number of banks that render the service. As banks get

bigger, then it becomes increasingly important for competitors to get bigger in order to compete for capable men in the labor market. Also, as computerization is introduced, banks must develop larger volume to make the best use of this equipment. In a city such as Philadelphia, the smaller bank is not always able to meet the wants of the small businessman or the daring, out-of-the-usual businessman, because it hasn't the financial assets, the capital, to meet losses. It is far from certain that a merger reduces opportunities of businessmen to get loans. It could increase them.

In Philadelphia, banking is less concentrated than in most comparable cities; e.g., Pittsburgh, Boston, Houston. Also, the largest Philadelphia banks are smaller than the largest banks in other cities.

There is keen competition among Philadelphia banks, an example being the race for savings. First Pennsylvania borrowed from Franklin National of Long Island the idea of 5-year, 4½% savings bonds which, if held to maturity, yield slightly more than 5%. All Philadelphia banks followed suit. Then PNB offered straight 5% on certificates of deposit of $2500 or more held for nine months. Then First Pennsylvania offered $25 certificates bearing 5% if held six months. Then Fidelity offered 5% certificates with attractive payment features.

Dr. Henry Kaufman—Economist, Salomon Brothers & Hutzler

Experience

B.A. in economics from NYU in 1948, M.S. in finance from Columbia in 1948, Ph. D. in banking and finance from NYU, 1958. Credit officer with Peoples Industrial Bank and then with Manufacturers Trust, 1949-57. Employed in research department of Federal Reserve Bank of New York 1960-61. Joined Salomon Brothers & Hutzler in 1962.

Testimony

In recent years there have been substantial changes in activities of commercial banks on both sides of their bal-

ance sheets; i.e., in the kinds of liabilities they assume in order to obtain funds and in the loans and other investments they make with the funds so obtained. The result has been to bring the banks into competitive relationships with other institutions with which they were traditionally considered non-competitive.

On the liability side, the raising of permissible interest rates allowed banks to compete with savings institutions for household savings. Banks attracted corporate funds through issuance of certificates of deposit, which were competitive with other short-term investments. Banks also found markets for capital debentures and notes, which permitted them to obtain funds on a longer-term basis. Demand deposits declined in relative importance. The banks' ability to attract funds, even from foreign sources, has had an effect on the cash balance of payments.

On the asset side, the business customers of the banks have relied almost exclusively on debt financing. They have looked to banks to provide not only short-term, self-liquidating loans, but longer loans to finance new processes, products and equipment, other longer-term needs. At the same time, banks have become principal suppliers of long-term funds to municipalities through purchase of municipal bonds. They also supply a large share of consumer credit and an increasing amount of mortgages. These activities bring them into competition with insurance companies, savings institutions, pension and retirement funds, and other investors.

In some aspects of short-term lending, banks are also encountering new competition, this time from large corporations which supply short-term funds to securities firms through repurchase agreements. Formerly these funds would have been deposited with a bank, which in turn would have loaned them to the securities firm.

Overall, it can be said that banks' activities are intermeshed with those of other financial institutions operating in both the long- and the short-term money markets.

G. Edward Cooper—Executive Vice President, Philadelphia National Bank

Experience

Employed by The Philadelphia National Bank February 1926, appointed Assistant Cashier in 1945, and progressed thereafter to Executive Vice President. Responsible for Operations, Systems and Planning, and Building Management at the present time. Served as a member of the Bank Management Committee of the American Bankers Association from 1954 to 1964 and was Chairman from 1959 to 1964. This Committee was responsible for the research and the development of automation for the banking system.

Testimony

Modern automation of bank operations can be said to have begun with development of MICR during mid-50's, coupled with improvement in check handling machines. In late 1950's, computers were introduced, first for record keeping, later to provide bank management with information for credit allocation, portfolio evaluation and similar functions to permit informed judgment on the use of funds and control of costs.

City banks offer computer services to smaller correspondents, including computerization of correspondent's operations, computerized information for the correspondent's management, and computerized services for correspondent's customers. Competition is keen. Country banks receive proposals from several banks, often in different cities. PNB considers itself one of leaders in Philadelphia. Principal competitor is First Pennsylvania. Also, Pittsburgh and New York banks.

EDP services provided by city banks to country banks enables them to provide services they could not otherwise afford, and thus improves quality of their services to their customers.

Banks also provide computer services to their customers; payroll accounting, accounting for savings and other financial institutions, accounts payable, account reconciliation. In this field they meet competition from service bureaus and from computer suppliers trying to persuade the customers to obtain equipment of their own.

Automation of internal operations and provisions of EDP services to correspondents and customers is expensive and time consuming. Equipment costs are high. Time and money are needed to develop programs. Equipment must be used near capacity to be profitable. Small banks obtain services from larger banks. Medium banks can and do obtain equipment and provide services to customers and to other banks. Big banks have no monopoly.

Important area of competition today is in attracting and holding qualified personnel, particularly those with mathematical specialties who are in great demand by technical, scientific and research companies. Among Philadelphia banks, only PNB and First Pennsylvania have such experts. New York banks have as many as six. Boston and Pittsburgh are also ahead of Philadelphia. Such people are working on innovations and new departures such as automated credit transfers within and among banks, the so-called "checkless society."

Overall effect of automation has been to provide better and more extensive services to customers of commercial banks. It has improved productivity, lowered costs and increased efficiency. The banks could not handle their present volume of business without it.

Nevins D. Baxter—Assistant Professor of Finance, Wharton School of Finance and Commerce, University of Pennsylvania

Experience

Education:

B.A. Columbia University (summa cum laude)
M.A. Princeton University (Economics)
Ph.D. Princeton University (Economics)

Positions Held:

Assistant Professor of Finance, Wharton School of Finance and Commerce, University of Pennsylvania, 1964-

Consultant, MATHEMATICA, Princeton, New Jersey, 1964-

Consultant, Federal Reserve Bank of Philadelphia, 1965-

Consultant, U.S. Treasury Department, Office of the Comptroller of Currency, 1966-

Research Associate, Econometric Research Program, Princeton University, 1964-

Instructor in Economics, Princeton University, 1963-64

Consultant, Bankers Trust Company, New York, 1960-63

Fellowships and Awards:

Woodrow Wilson National Fellowship, 1961-62

H. B. Earhart Fellowship, 1962-63

Harold Stonier Fellowship in Banking, 1963-64

Ford Foundation Faculty Summer Research Fellowship, 1965

Principal Investigator, National Science Foundation Grant for "Empirical Study of Corporate Financing Decisions", 1966-

Professional Affiliations:

American Economic Association

American Finance Association

Royal Economic Society

Fields of Specialization:

Money, credit and banking

Business finance

Public finance

Testimony

Customers of commercial banks have become more sophisticated in recent years, and this has required the banks themselves to provide more expert and specialized services.

Almost one-half the country banks in the Third District now buy or sell federal funds, as compared with just over one-third in 1965. These transactions are handled through and with the advice of city correspondents. City banks, in order to provide complete service to their country correspondents, must have experts in this field.

Corporate treasurers also make demands on their banks. With rise in interest rates, corporate treasurers reduced demand deposits and put excess funds into government securities and commercial paper. This forced banks to offer certificates of deposit to compete for the funds. Many corporate treasurers also expect more service from their principal banks. They expect their banks to be able to handle any kind of financial transaction the corporation may need; for example, accounts receivable financing, equipment leasing, EDP services, foreign banking, and international commerce. Municipal and institutional customers have similar needs.

City banks which cannot meet these increasingly complex demands because of a lack of experience or specialized personnel or otherwise are at a competitive disadvantage in attracting and retaining the more progressive customers and in competing with the more specialized city banks which are able to offer these services.

Philip Walsh Moore—Chairman, First Research Corporation, Miami, Florida

Experience

Graduate of Princeton University; obtained M.A. degree at New York University Graduate School of Business Administration. After World War II, was securities

and economic analyst for First Boston Corporation, 1945-48; Assistant to the President, Schroder Rockefeller & Co., 1948-50. In 1950 formed First Research Corporation, a market research firm specializing in financial institutions, retail establishments and general consumer marketing.

Testimony

Under Mr. Moore's overall supervision, First Research Corporation has delineated the primary service areas of all the offices of Provident and Central-Penn, with the exception of the head offices; the offices at 17th Street; the offices at 12th Street; and the Provident office at Juniper and Market Streets. In Mr. Moore's opinion, there is an insignificant overlap at the present time between the branch systems of Provident and Central-Penn.

It is also Mr. Moore's opinion that neither the branch system of the Provident nor that of Central-Penn, as presently constituted, provide thorough coverage of all or even most of the developed portions of the Philadelphia four-county area. In contrast, the individual branch systems of Philadelphia National, Girard Trust and First Pennsylvania provide these banks with more complete systems of branch representation throughout the region. If combined, the Provident and Central-Penn branch systems will provide excellent coverage and they will be better able to compete effectively with Philadelphia National, Girard Trust and First Pennsylvania throughout the four-county area.

Jack M. Guttentag—Associate Professor of Finance, Wharton School of Finance and Commerce, University of Pennsylvania

Experience

Graduated from Purdue University 1948; received M.S. from Columbia University in 1949 and a Ph.D. from Columbia University in 1958. Between 1948 and 1954 was at various times an instructor at Elmira College, Elmira, New York; housing market analyst for the Federal Housing

Administration; and economist for Prudential Insurance Company. Served as economist for the Federal Reserve Bank of New York from June 1954 to August 1962. Joined the faculty of the University of Pennsylvania in September 1962.

Testimony

Professor Guttentag will express the opinion that the concentration statistics in the plaintiff's summary of evidence (and in the complaint and the plaintiff's pretrial brief) do not show that the merger will have a significantly adverse effect on competition. Concentration ratios and increases therein do not necessarily indicate an anti-competitive effect. In certain situations concentration ratios may indicate an anti-competitive effect, but in this case the statistics are not meaningful because they are not based on a proper analysis of either the product market or the geographical market.

If a concentration ratio is to be a meaningful index of competition, it must be based on a correct account of all the competitors and their shares of the markets in which they compete. Plaintiff's statistics assume a single product, termed "banking services," and ignore the diverse products which the banks actually provide for their various customers. The effect is to ignore many suppliers of these services who are in direct competition with the banks and should be included in any statistics as to concentration. The plaintiff's statistics take into account only banks having offices in the Philadelphia four-county area and give no effect to competition from banks located outside the area. Again, the effect is to ignore suppliers who should be included in the concentration figures.

In point of fact, the geographical area in which banks compete varies in respect of different services and also in respect of different kinds and sizes of customer. The area of competition in retail banking may have a radius of a few blocks in urban areas or a mile or two in rural areas. The area of competition in correspondent banking encompasses

several states. The area of competition for substantial corporations includes the Mid-Atlantic region or, indeed, the entire United States. The range in these areas is so great that it would not be meaningful to strike an average among them. Thus, neither the four-county area nor any other single area would be satisfactory from the point of view of economic analysis. Different areas would have to be used for the different services and classes of customer. Such an analysis would not have been unduly difficult for the plaintiff's witnesses to make.

Even if the plaintiff's concentration statistics were based on a proper delineation of product and geographical markets, they would not be of substantial significance. The prevailing level of concentration in Philadelphia is low in relation to other metropolitan areas, and there are a large number of small banks in the Philadelphia area which provide alternative sources of banking service for small and intermediate size business customers. Both of the banks involved in the merger are very substantially smaller than the leading banks in the area. The increase in concentration resulting from the merger is relatively small. Such studies as have been made with respect to the relationship between bank concentrations and competition would indicate that, even on the basis of the plaintiff's own concentration figures, any anti-competitive effects of this merger would be negligible.

Comparisons between the plaintiff's concentration ratios in this case and concentration ratios in non-banking industries are not significant because of the defects in the plaintiff's statistics mentioned above, and also because, in banking, competition is often maintained at higher concentration ratios than in industry generally. Moreover, as banks get larger they tend to supply a wider variety of services and to become more aggressive competitors. Thus, a merger such as that of Provident and Central-Penn may well improve the quality of banking services without causing any significant diminution in competition.

COMPTROLLER OF CURRENCY'S LIST OF WITNESSES WITH A BRIEF SUMMARY OF THE EXPECTED TESTIMONY OF EACH.

In accordance with the Court's instructions (Transcript of Proceedings of October 26, 1966, p. 13 and of November 9, 1966, p. 26), there is submitted below the Intervenor's List of Witnesses together with an outline of the expected testimony of each.

It is anticipated that some of these witnesses will be dropped as evidence is developed during the trial. Due to the difficulties of scheduling meetings, a few prospective witnesses have not as yet been interviewed. For this reason, the Intervenor may supplement this listing at a later date.

The order of the listing of names does not indicate the order by which the witnesses will be called to testify.

1. *James J. Saxon,* Comptroller of the Currency, Treasury Department (Nov. 1961-1966), will testify relative to the reasons for his approval of the merger of Provident National and Central-Penn National banks. He will discuss the national policy of the Comptroller's Office and how the above-mentioned merger fits into the policy. In connection with the Provident–Central-Penn merger, Mr. Saxon will discuss the anti-competitive effects; the pro-competitive effects; the public interest involved; the needs of the community; the benefits to the community; and how the needs and conveniences of the community outweigh the anti-competitive effects, if any, of the merger.

2. *Walter Norcross,* Treasurer, The Budd Company, Philadelphia, Pennsylvania, will testify concerning the following areas:

Sales, size and operation of his company; (i.e., greater competition among the larger Philadelphia banks and with out-of-state banks). Merger will be pro-competitive.

Advantages to the business community in the Philadelphia area, and increased lending limit.

How his company chooses a bank connection and what his company is likely to do should this merger be upheld.

Benefits from expanded services of the bank following merger.

His company's size and banking needs.

3. *B. F. Leiber,* Secretary-Treasurer, Food Fair Stores, will testify concerning the following areas:

Sales, size and operation of his company.

How and why a business chooses a specific bank.

His company size and banking needs.

Bank competition for his company's *accounts.*

What his company might do should this merger be upheld.

Needs of the Philadelphia community for larger institutions.

4. *Richard Bond,* President, John Wanamaker Stores, Inc., will testify concerning the following areas:

Sales, size and operation of his company.

How this merger will help the city and community of Philadelphia.

The merger will be pro-competitive.

Competition by and solicitation of New York banks.

5. *William B. Eagleson, Jr.,* Senior Vice-President, Girard Trust Bank, will testify concerning the following areas:

Merger will be pro-competitive.

Resultant bank able to give better and more services.

Girard and other banks compete with various other financial institutions.

Competition by and with Certificates of Deposits.

Competition from New York banks.

Merger complementary.

6. *Harvey Robbins,* Treasurer, Pennsylvania Fruit Company, Philadelphia, Pennsylvania, will testify concerning the following areas:

Sales, size and operation of his company.
Preference in bank connections, and reasons.
Why a large bank benefits his company.
Merger not harmful.
Competition and solicitation by out-of-state banks.

7. *R. G. Dunlop,* President, Sun Oil Company, Philadelphia, Pennsylvania, will testify concerning the following areas:

Sales, size and operation of his company.
Pro-competitive merger.
Competition and solicitation by out-of-state banks.
Need for greater accumulation of capital and available bank resources.
Why large bank benefits his company and Philadelphia.

8. *W. Cooper Willits,* Vice-President and Treasurer, Pennsalt Chemical Corporation, Philadelphia, Pennsylvania, will testify concerning the following areas:

Sales, size and operation of his company.
Pro-competitive merger.
Preference in bank connections and reasons.
Better services will result.
International Department important.
Importance of large lending limits.
Merger will benefit Philadelphia.
Philadelphia banks have not kept pace economically and with other banks.

9. *John Kerslake,* Vice-President and Treasurer, In Charge of Banking Relationships for Reading Company, Philadelphia, Pennsylvania, will testify concerning the following areas:

Sales, size and operation of Reading Company.
Reading's banking connections, its needs and reasons.

Resultant bank will give more and better services, including business advice.

Better able to serve small as well as large companies.

Strengthen Philadelphia banking structure and keep money in Philadelphia.

Competition and solicitation by out-of-state banks.

Pro-competitive merger.

10. Victor Potamkin, President (owner), Potamkin Chevrolet, Philadelphia, Pennsylvania, will testify concerning the following areas:

Sales, size and operation of his company.

Need for larger banks in Philadelphia.

His banking needs and benefits to him by merger.

Competition by banks and other financial institutions, especially as to floor planning.

Pro-competitive merger.

11. Edward McGinley, President, Beneficial Mutual Savings Bank, Philadelphia, Pennsylvania, will testify concerning the following areas:

Pro-competitive merger.

Competition with other financial institutions.

Competition of New York banks in Philadelphia area and nature of competition between New York and Philadelphia banks.

Merging banks complementary.

Resultant bank better able to give more and better services.

12. E. Paul Oliphant, President, Union Trust Company, Pottsville, Pennsylvania, will testify concerning the following areas:

Merger not harmful.

Competition of New York banks in Philadelphia area.

13. George F. S. Elder, Deputy Manager of Brown Brothers and Harriman, Philadelphia, Pennsylvania, will testify concerning the following areas:

Size and operation of company.

Pro-competitive merger.

Merger not harmful, merger beneficial.

Merging banks complementary.

Resultant bank better able to serve Philadelphia.

Merger will keep money in Philadelphia and attract business.

14. *Thacher W. Longstreth,* Chamber of Commerce for Greater Philadelphia, will testify concerning the following areas:

Pro-competitive merger.

Need larger banks to compete with New York banks.

Banks have not kept pace with growth rate.

Merger will help Philadelphia area.

Need larger banks to attract business—create jobs.

15. *Thorton Bradshaw,* Treasurer, Atlantic-Richfield Corporation, will testify concerning the following areas:

Sales, size and operation of company.

Need for larger banks in Philadelphia.

Need for larger lending limits and bank foreign departments in Philadelphia area.

Merger to benefit businesses in Philadelphia.

16. *Hubert P. Earle,* President, Pennsylvania Warehousing and Safe Deposit Company, Philadelphia, Pennsylvania, will testify concerning the following areas:

Size and operation of company.

Merger not harmful—no effect on his company.

Pro-competitive merger.

Merging banks complementary.

Benefits to community and small borrower which will result from merger.

Merger will keep money in Philadelphia.

17. *Oliver S. Twist,* Vice-President and Title Officer, Frankford Trust Company, will testify concerning the following areas:

Size and operation of bank.

Merger pro-competitive.

Competition with other financial institutions and certificate of deposit competition.

Merger not harmful but beneficial.

Community to be better served by merger.

18. *Hubert Horan, Jr.,* Chairman of Board, Continental Bank and Trust Company, will testify concerning the following areas:

Size and operation of Continental.

Merging banks complementary.

Merger pro-competitive.

Merger not harmful but beneficial.

Need for larger banks in Philadelphia area.

Competition from and by out-of-state banks.

19. *W. E. Mullestein,* Executive Vice-President Lukens Steel Company, Coatesville, Pennsylvania, will testify concerning the following areas:

Sales, size and operation of his company.

Pro-competitive merger.

Competition for business by and from out-of-state banks.

Merger will be beneficial to his company, especially growth of International Department, and business generally in the Philadelphia area.

Lukens banking connections and needs.

Merger will benefit the community.

Merger will stimulate business.

20. *Norman Denny,* President, Lincoln National Bank, will testify concerning the following areas:

Size, growth and operation of Lincoln National.

Merger complementary.

Merger pro-competitive.

Lincoln and other banks compete with various other financial institutions.

Merger not harmful but beneficial.

Competition from New York banks.

Merger will stimulate Philadelphia banking which has not been keeping pace or been aggressive.

Benefit community, especially higher lending limit.

21. John J. McSorley, Vice-President, Irving Trust Company, will testify concerning the following areas:

Size and operation of company.

Irving Trust and other New York banks compete in Philadelphia area.

Merger would create more competition for New York banks and among the larger Philadelphia banks.

Merger will decrease need to go to New York.

Businesses prefer to deal locally.

22. Charles Becker, Vice-President, Manufacturers-Hanover Trust Company, will testify concerning the following areas:

Size and operation of company.

Manufacturers-Hanover and other New York banks compete in Philadelphia area for deposits, savings and loans.

Merger will result in more competition for Manufacturers-Hanover, other out-of-state banks and the large Philadelphia banks.

Merger will result in greater competition for correspondent bank business.

23. Bruce Brandi, Assistant Vice-President, National Division, Chemical Bank New York Trust Company, will testify concerning the following areas:

Size and operation of company.

Chemical and other New York banks compete in Philadelphia area for national accounts and large local business.

Merger would create more competition for Chemical, other New York banks and the larger Philadelphia banks.

New York banks will lose business as a result of such merger and more money would stay in Philadelphia.

Resultant bank better able to compete nationally and for correspondent bank business.

24. Wentworth Johnson, President, Stetson Company, formerly an official of Fidelity-Philadelphia Trust Co., will testify concerning the following areas:

Sales, size and operation of company.

Pro-competitive merger.

Merger beneficial to both banks, and merger complementary re: Commercial departments, trust departments, staff, services and branch operations.

Larger banks will serve community better in many ways some of which are better services, keep money in Philadelphia, better trained personnel, better branching, larger lending limit, better services to business people, and better data processing services.

Competition with out-of-state banks.

Competition between banks and other financial institutions.

25. W. Robert Davis, President, Camden Trust Company, Camden, New Jersey, will testify concerning the following areas:

Size and operation of the company.

Competition of Camden Trust in Philadelphia and surrounding areas and of the Philadelphia banks in Camden and surrounding area.

26. William H. Bell, Jr., First Camden National Bank & Trust Company, Camden, New Jersey, will testify concerning the following areas:

Size and operation of company.

Competition of First Camden in Philadelphia and surrounding area, and of the Philadelphia banks in Camden and the surrounding area.

27. Frank Cisar, Bureau of the Budget, Office of Statistical Standards, Washington, D. C., also Chairman of the Technical Committee On Area Definitions and Secretary of the

Federal Committee on Standard Metropolitan Statistical Areas, will testify concerning the following areas:

The acceptability and concept of the Standard Metropolitan Statistical Area as the market area to be used in the instant action.

28. *Walter F. Ryan,* Deputy Chief, Office of Statistical Standards, Bureau of the Budget, Washington, D. C., and Chairman of the Federal Committee on Standard Metropolitan Statistical Areas, will testify concerning the following areas:

The acceptability and concept of the Standard Metropolitan Statistical Area as the market area to be used in the instant action.

29. *Gustave G. Amsterdam,* Chairman of the Board of Bankers Securities Corporation, Philadelphia, Pennsylvania, will testify concerning the following areas:

Sales, size and operation of company.

Pro-competitive merger.

Resultant bank would have higher lending limit and be able to give better services, advice, etc., to businessmen.

Resultant bank would keep money in Philadelphia.

Resultant bank could do a better banking job and be beneficial to the community.

Bankers Security would rather do business locally, as would most businesses.

30. *G. Collingwood,* Treasurer, Air Products & Chemical, Inc., Allentown, Pennsylvania, will testify concerning the following areas:

Sales, size and operation of the company.

Pro- ompetitive merger.

Merger beneficial to both banks.

Merger complementary.

Merger would serve business and community better.

Air Products banking needs and how the merger will benefit his company, such as increase lending limit, better services, advice, etc.

31. *Nevins D. Baxter,* B.A., M.A., Ph.D., Assistant Professor of Finance, Wharton School, University of Pennsylvania, Consultant, Federal Reserve Bank of Philadelphia, Consultant, Mathematica, Princeton, New Jersey, and Regional Economic Consultant to Comptroller of the Currency, will testify concerning the following areas:

Acceptability and concept of the Standard Metropolitan Statistical Area (SMSA) as the market area applicable.

Advantages of another large billion dollar bank to the community and the banking industry.

Competition between banks in the Philadelphia area and benefits resulting therefrom.

Competition from New York banks and other out of state banks for national accounts, deposits, business of large concerns, large loans and for correspondent banks.

Competition between banks and other financial institutions, and the changing nature of commercial banking.

Dr. Baxter's testimony will be supported, in part, by statistical compilations, charts and graphs.

32. *Marshall Abrahamson,* Former Regional Comptroller of the Currency, Third National Bank Region, 925 Chestnut Street, Philadelphia, Pennsylvania, will testify concerning the following areas:

Duties and responsibilities of the Regional Comptroller of the Currency.

Pro-competitive effect of the merger.

Composition of the banks involved.

Complementary nature of the banks involved.

Benefits of the merger to the community, the public and the banks.

33. *T. M. Brezinski,* Director, Bank Organization Division, Comptroller of the Currency's Office, Washington, D. C., will testify concerning the following areas:

The number of applications for bank charters filed in the Philadelphia area since 1947 and the action taken and reasons therefor.

Criteria used in granting new bank charters.

34. R. Coleman Egertson, Regional Comptroller of the Currency, 925 Chestnut Street, Philadelphia, Pennsylvania, will testify concerning the following areas:

Requirements of chartering national banks.

Requirements of chartering state banks and the differences.

Number of banks in State.

Number of new charters.

Growth of banks and how new banks have prospered.

Possibilities of new entrants.

35. Paul F. Preston, Research Assistant, Department of Economic Research, Comptroller of the Currency's Office, Washington, D. C. will testify and introduce documents compiled by him or under his supervision concerning the following areas:

The concept and economic acceptability of the Standard Metropolitan Statistical Area (SMSA) as applied to the Philadelphia area.

Concentration locally, regionally and nationally; as it relates to labor force, population, sales, deposits, commercial banks, manufacturing and savings.

Competition between commercial banks and other financial institutions.

Respectfully submitted,

/s/ PHILIP L. ROACHE, JR.
Philip L. Roache, Jr.

/s/ CHARLES H. MCENERNEY, JR.
Charles H. McEnerney, Jr.

/s/ EUGENE METZGER
Eugene Metzger

/s/ GILBERT AMYOT
Gilbert Amyot

Attorneys for the Comptroller
of the Currency

OPINION AND ORDER OF DISTRICT COURT DATED DECEMBER 29, 1966

Clary, *Ch. J.* December 29, 1966.

This is an action by the United States Government, filed by the Department of Justice (hereinafter referred to as Justice), to enjoin a merger of the Provident National Bank and Central-Penn National Bank of Philadelphia. The complaint was filed on April 1, 1966, the banks answered on April 5, 1966, and the following day the Comptroller of the Currency intervened as a party. Motions to dismiss were filed by the defendants and intervenor, and on October 13, 1966 an Opinion was filed (Docket Paper #34), together with an Order denying the motions. The basis of the Opinion was that, although this action was solely within the ambit of the Bank Merger Act of 1966 (hereinafter referred to as BMA-66), under principles of notice pleading, it was not necessary to specifically plead the BMA-66. Thus, the complaint of Justice filed under Section 7 of the Clayton Act was held valid.

However, in *United States v. Mercantile Trust Company National Association, et al.*, Civil Action No. 65C 241 (1), (Eastern District of Missouri, Eastern Division, December 19, 1966), Chief Judge Roy Harper held, on pleadings which are completely similar to the instant case, the following:

> "The complaint does not allege a monopoly, but alleges that the merger may substantially lessen competition and tend to create a monopoly in violation of Section 7 of the Clayton Act. Thus, the complaint only states part of a claim against the defendants required under BMA-66, in that it does not allege a monopoly, nor that the anticompetitive effects of the merger are not outweighed in the public interest by the probable effects of the transaction in meeting the convenience and needs

of the community. The plaintiff's complaint does not meet the absolute basic minimum standards of notice pleading, in that it has not alleged a violation of BMA-66, the act that applies to all bank mergers, nor has it alleged sufficient facts to support such violation."

Judge Harper dismissed the case with privilege to amend within twenty days. In the instant case, with the pleadings complete, the Government has taken an adamant position as hereinafter discussed.

After the Opinion of October 13, 1966 denying the motions to dismiss was filed, further pre-trial proceedings were had, and the Court ordered each side to submit an Identification of Witnesses, Summary of Evidence, and Statement of Position. This the Department of Justice did on November 30, 1966 (Docket Paper #44). In this document Justice stated unequivocally that it intended to prove a violation of Section 7 of the Clayton Act only, without any reference to BMA-66, contending that this was an action under Section 7, and that it was entitled to a determination of the issues on that sole basis. The ruling of this Court was exactly to the contrary.

The defendant banks, upon being served with plaintiff's Identification of Witnesses, Summary of Evidence, and Statement of Position on December 2, 1966, filed a Motion for Final Judgment (Docket Paper #45) with exhibits in support thereof. The Comptroller intervenor filed a Motion for Final Judgment (Docket Paper #46) on December 6, 1966. Thereafter, on December 12, 1966, a conference was held in chambers at which the subject was discussed in depth, a transcript of which hearing is part of the record of this case, and the Court took the matter under consideration. It is these two Motions for Final Judgment which are presently before the Court for disposition.

To date no one has denied the fact that Provident, in the four-county market area designated by the Opinion of the Supreme Court in *United States v. Philadelphia National*

Bank, 374 U. S. 371 (1963),[1] controls a definite percentage of the total assets, of the total loans, of the total IPC deposits, and of the total banking offices. Likewise, no one has denied that Central-Penn controls a definite percentage of the total assets, of the total loans, of the total IPC deposits, and of the total banking offices doing business in the four-county area. In other words, no one has denied that there will be a concentration of the total of these two percentages of the total assets, of the total loans, of total IPC deposits, and of the total banking offices in the four-county area in the new bank if merged as permitted by the Comptroller of the Currency. Justice says in its Statement of Position that it will prove this and no more. Paying lip service to the ruling of this Court of October 13, 1966, it contends that BMA-66 may have some relevancy, but that this Court is without power to consider in any way the finding of the Comptroller that this merger meets the specifications and qualifications of BMA-66.

This Court has thus been asked by the Government to rule that the banks and Comptroller must present evidence with respect to the merger de novo as if it were being done for the first time; come to its own conclusions independently of the Comptroller and "free of presumptions traceable to anyone"[2] in determining the validity of this merger. The expertise, know-how, direct findings, and conclusions of the Comptroller, the Government contends, are of absolutely no probative value in this Court. In other words, the Government contends that this Court must make an independent decision as to whether the public interest in the merger outweighs any anticompetitive effects. This contention, if considered again, would raise the constitutional question of separation of powers:

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(1) Despite the finding of the District Court that the two banks involved in that case were realistically in competition with banks of other states, the Supreme Court limited its consideration of the case to a four-county area.

(2) Plaintiff's Pre-trial Brief (Docket Paper #16), page 28.

"If the function performed by an agency is 'administrative' or 'legislative' and if a federal court is required to do all over again what the agency has done, the system of review violates Article III of the Constitution." Davis, Administrative Law Treatise, 1958, Vol. 4, p. 180, §29.10.

See also the Opinion of Judge Pope in *United States v. Crocker Anglo National Bank, et al.*, Civil Action No. 41,808, (District of California, Southern Division, October 6, 1966).

The Court, therefore, finds that since Justice has definitely refused to try its case under BMA-66, the banks should not be subjected to the expense and inconvenience of a trial when Justice refuses to prove other than admitted facts to establish its case. Its position has been taken deliberately and directly in opposition to the ruling of the Court of October 13, 1966 and is consistent with the position of the Government on a nationwide basis, even though the Courts have been unanimous in refusing to accept its contention. *United States v. Mercantile Trust Company National Association, et al.*, No. 65C 241 (1), (District of Missouri, Eastern Division, December 19, 1966); *United States v. First City National Bank of Houston, et al.*, Civil Action No. 66-H-695, (Southern District of Texas, Houston Division, December 2, 1966); *United States v. First National Bank of Hawaii, et al.*, Civil Action No. 2540, (District of Hawaii, October 31, 1966); *United States v. Crocker Anglo National Bank, et al.*, Civil Action No. 41,808, supra.

At the hearing on December 12, 1966, Justice also took the position that if the Court should grant the motion of the defendant banks and the intervenor, the Court should, in the exercise of its discretion, continue the statutory stay automatically entered when this suit was filed, taking the position that it was the sole purpose of Congress to halt all mergers after suit was filed until there has been a final determination on the merits. In this instance, it is the Department of Justice alone which has refused to proceed with trial on the merits of the case under BMA-66. I can read

nowhere in the legislative history that it was the intention of the Congress of the United States to hold up mergers indefinitely pending determination of a Department of Justice theory. It appears throughout the legislative history that the Congress was concerned with the problems of divestiture as well as the tremendous expense to the applicant banks when mergers were unduly delayed, and that stay should be granted only when the Government, through the Department of Justice, in good faith proceeded promptly to a trial on the merits. This Justice refuses to do by its intransigent position of the applicability of Section 7 of the Clayton Act only. It is, therefore, the decision of this Court that it will not stay the merger, except for a relatively short time to permit Justice to take such further action as it sees fit. A time lag, even of the statutory time for appeal, at the present time, might destroy the efficacy of the merger because of mounting expense.

The Court, therefore, enters the following

ORDER

And Now, to wit, this 29th day of December, 1966, upon consideration of defendant banks' Motion for Final Judgment (Docket Paper #45), Motion of Intervenor for Final Judgment (Docket Paper #46), the entire record of the case, including briefs, hearings and arguments, it is Ordered, Adjudged and Decreed:

1. That the complaint in this case be and it is hereby Dismissed with prejudice;

2. That the statutory stay of the merger is Lifted and the banks may merge at a time to be determined by them, but not earlier than January 18, 1967.

By THE COURT:

/s/ Thomas J. Clary

Ch. J.

D. PROCEEDINGS IN SUPREME COURT ON APPELLANT'S APPLICATION FOR STAY.

Memorandum of Defendant-Appellees in Opposition to Plaintiff's Application for a Stay.

1. INTRODUCTION.

This case is before the Court on an application for a stay filed by the Department of Justice, plaintiff below. The purpose of the application is to enjoin the merger of Provident National Bank and Central-Penn National Bank, defendants below. The plaintiff's action to enjoin the merger under the Clayton Act was dismissed with prejudice by the District Court for the Eastern District of Pennsylvania on December 29, 1966, toward the close of pretrial proceedings. The order of the District Court permits the Banks to merge on or after January 18, 1967. They propose to merge on January 20.

Fourteen months have passed since November of 1965, when the Banks announced their intention to merge. Plaintiff's motion faces them with the possibility of at least eighteen months [1] of additional delay. The Banks are opposing the motion for the basic reason that additional delay may destroy the merger, with serious consequences to the Banks and to their ability to compete with the larger banks in Philadelphia.

Plaintiff's application for stay states that the issues posed in this case are the same as those in *United States v. First National Bank of Houston, et al.*, No. 914. The application also implies that the procedures in the District Court were the same in the two cases. In fact, the issues are different and the procedure below was different, as the following history will show.

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1. This would appear to be a minimum period, assuming that this Court disposes of plaintiff's appeal in the current term; that the case is then tried, with a final judgment by the District Court toward the end of this year; and that a second appeal to this Court may be disposed of, without the necessity of remand, before June of 1968.

2. History of the Case.

1. On December 6, 1965 the Banks filed with the Comptroller of the Currency their application for approval of their proposed merger under Section 18(c) of the Federal Deposit Insurance Act, as amended by the Bank Merger Act of 1960.

2. On February 21, 1966 the Bank Merger Act of 1966 became effective. Among other things, it rewrote Section 18(c) of the Federal Deposit Insurance Act. It established new standards to be applied by the Comptroller in passing on merger applications and provided that in any judicial proceeding attacking a merger, the court should apply the identical standards which the Comptroller was directed to apply. The text of the Act is set forth in Appendix 1 filed with this memorandum.

3. On March 31, 1966 the Comptroller issued his decision approving the merger. He found that the competition which would be eliminated by the merger is miniscule. He further found that "the climate of competition would be stimulated by the increased capacity of a large scale bank, and the range of choices available to customers who require services which can only be rendered by a large bank would be increased"; that "the increased lending capacity of the resulting bank will benefit large banking customers through the creation of an additional source of very large loans"; that "with its greater financial resources and larger operations to assume acquisition and start-up costs, the resulting bank will be better able to provide the public with the latest advances in data processing services"; that "an adequate number of alternative sources of financial services exist in the Philadelphia area"; that "competition among the large financial institutions will be stimulated"; and that "the increased ability of the resulting bank to serve the convenience and needs of the Philadelphia area by increased efficiency, by a greater lending

capacity, through more adequate banking quarters, and by a generally improved quality of banking services makes this merger desirable."

The Comptroller concluded that: "We would be hindering the economic growth of Philadelphia if we failed to give our approval to this merger application."

4. On April 1, 1966, the Department of Justice filed its complaint, seeking an injunction under the Clayton Act. The Comptroller intervened to defend his decision as provided by the Bank Merger Act of 1966.

5. On June 7, 1966, the District Court issued Pretrial Order No. 1, providing that:

(a) The plaintiff was to file its pretrial brief setting forth the plaintiff's views on the legal issues, its contentions as to burden of proof on these issues, and the facts which it expected to prove in support of its claim.

(b) The defendants were then to file their pretrial brief setting forth their answering contentions and the facts which they expected to prove in defense.

(c) Finally, the plaintiff was to file its reply brief setting forth its contentions and the facts, if any, which plaintiff expected to prove "in rebutting any affirmative matter raised by defendants."

Any issues, contentions or claims not set forth in the pretrial briefs were to be deemed "abandoned, uncontroverted or withdrawn." A copy of Pretrial Order No. 1 appears in Appendix 1 filed concurrently herewith.

6. In response to Pretrial Order No. 1, the parties filed their briefs.

(a) Plaintiff's pretrial brief outlined a statistical case under Section 7 of the Clayton Act. It alleged a trend toward concentration, the merger of the fifth and

sixth[2] largest banks to form the fourth largest with 14% of total assets, loans and deposits and 15% of banking offices of the 36 banks doing business in the Philadelphia four-county area. In the plaintiff's view, this case "is *United States v. Philadelphia National* all over again, only that the names have been changed."

(b) Defendant Banks' pretrial brief took direct issue with the plaintiff's Clayton Act case. It pointed out that this case is not "*Philadelphia National* all over again" because the merger will produce the fourth bank, not the first, with less than half the market share which this Court held to be an undue percentage in *Philadelphia National*, and because the increase in concentration here is less than one-third the increase involved in that case. The Banks further contended that their competition in the national wholesale banking market is insignificant in relation to the size of that market; that they are not in substantial competition in the retail market because their branch systems serve different localities within the Philadelphia four-county area; that the merger will have no adverse effect on competition in the field of trusts, where Provident is and will remain the fourth largest bank and Central-Penn is less than one-tenth the size of Provident; and that the fields of specialty of the two Banks are likewise complementary rather than competitive. Finally, the brief set forth the facts the Banks will prove to show that the merger is in the public interest; namely, that the merger will solve very substantial competitive problems confronting Central-Penn in its competition with the largest banks in the City, which are more than four times its size; that it will produce operating economies in excess of $1.25 million annually; that it

2. Actually, even on the basis of plaintiff's figures as of 1965, Central-Penn appeared to be the seventh largest bank, not the sixth. There is no doubt that it had declined to seventh place at the end of 1966.

will also produce a better quality of banking services and enhanced competition with the four largest banks in Philadelphia; and that it will assist in the development of the Port of Philadelphia and the revitalization of Philadelphia's economy.[3]

(c) Plaintiff's reply brief was required to set forth its reply to the affirmative contentions of the Banks; i.e., the Banks' contentions as to the public interest in the merger and its effect in meeting the convenience and needs of the community to be served. With respect to these contentions, the reply brief said that plaintiff "is not in a position to inform this Court whether plaintiff believes the conclusions reached [in the Banks' brief] are correct or not." In plain words, plaintiff could not set forth a case on community convenience and need even by way of rebuttal.

The plaintiff's pretrial brief and reply brief are contained in Appendix 2. The Banks' pretrial brief is in Appendix 3. Together they present a complete résumé of the factual contentions of the parties. No such pretrial record was made in the *Houston* case.

7. On August 5, 1966 the Comptroller filed a motion to dismiss the complaint like the motion he filed in the *Houston* case. The Banks filed a similar motion on August 22. On October 13 the District Court entered an Opinion and Order denying the motions to dismiss on the ground that, while the action would be governed by the Bank Merger Act, the complaint under the Clayton Act was sufficient to inform the defendants of the claim against them. A copy of this opinion is contained in Appendix 1. The holding of the District Court as to the sufficiency of the complaint

3. The brief also showed that the plaintiff's statistics as to market shares and concentration are meaningless because they fail to distinguish between wholesale and retail markets and do not take into account the competition within the four-county area from banks outside the area, the competition from other financial institutions, and the complementary character of Provident and Central-Penn.

in this case is precisely opposite to the holding in the *Houston* case. *Houston* is before this Court on a preliminary issue of pleading. This case has progressed through the pretrial stage and the District Court's judgment here is in the nature of a directed verdict.

8. On October 26, 1966 the District Court set down for argument on November 4 the questions of burden of proof and the weight to be given to the Comptroller's decision. On November 4, having received briefs from the Banks and the Comptroller and heard argument by the plaintiff, the Court delivered its opinion stating that the proceedings would take the form of a review de novo similar to those described in *First National Bank of Smithfield, North Carolina v. Saxon*, 352 F. 2d 267, 271 (4th Cir. 1965); that the Court would hear all evidence in law and in fact, and if it then appeared that the Comptroller's decision was dependent on the exercise of discretion, the Court would bow to that discretion; and that, if the Comptroller appeared to have abused, exceeded or arbitrarily applied his discretion, the Court would set aside his approval. The Court further ruled that the Department of Justice, in order to make out a prima facie case, must establish that there are anticompetitive effects as defined in the Bank Merger Act and that these are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. A copy of this opinion is contained in Appendix 1. There was, of course, no such opinion in *Houston*.

9. After the Court's order of November 4, plaintiff filed a summary of evidence and statement of position stating that it did not intend to offer proof either of the existence or the significance of convenience and needs factors. Defendants then moved for final judgment under Rule 41(b)—i.e., a judgment such as would be entered upon motion for dismissal after completion of the plaintiff's case if the plaintiff failed to make out a prima facie case.

On December 29, 1966, the District Court entered the judgment which the defendants requested. A copy of the District Court's order of December 29 is contained in Appendix 1. The outlines of testimony filed by plaintiff, the Banks and the Comptroller are contained in Appendix 4. There were, of course, no such documents in *Houston.*

3. The Question Presented.

The question presented is whether the merger should be stayed pending appeal after the District Court has dismissed the action with prejudice. Such a stay has already been passed upon by the District Court. At a pretrial conference on December 12, counsel for the plaintiff asked the Court to exercise its discretion by granting a stay pending appeal on the ground that if the merger were permitted and the plaintiff was ultimately successful, the merger could not be "unscrambled." The Court, in its order of December 29, rejected the request for a stay, saying:

> "At the hearing on December 12, 1966, Justice also took the position that if the Court should grant the motion of the defendant banks and the intervenor, the Court should, in the exercise of its discretion, continue the statutory stay automatically entered when this suit was filed, taking the position that it was the sole purpose of Congress to halt all mergers after the suit was filed until there has been a final determination on the merits. In this instance, it is the Department of Justice alone which has refused to proceed with trial on the merits of the case under BMA-66. I can read nowhere in the legislative history that it was the intention of the Congress of the United States to hold up mergers indefinitely pending determination of a Department of Justice theory. It appears throughout the legislative history that the Congress was concerned with the problems of divestiture as well as the tremendous expense to the applicant banks when mergers were unduly delayed, and that stay should be granted

only when the Government, through the Department of Justice, in good faith proceeded promptly to a trial on the merits. This Justice refuses to do by its intransigent position of the applicability of Section 7 of the Clayton Act only. It is, therefore, the decision of this Court that it will not stay the merger, except for a relatively short time to permit Justice to take such further action as it sees fit. A time lag, even of the statutory time for appeal, at the present time, might destroy the efficacy of the merger because of mounting expense."

Where a lower court, fully familiar with the facts, has exercised its discretion to deny a stay, this Court requires an "extraordinary showing" before it will grant a stay. *Magnum Co. v. Coty,* 262 U. S. 159, 164 (1922). In that case, Chief Justice Taft stated that, even where this Court has granted plenary review by certiorari, "it requires a clear case and a decided balance of convenience before it will grant such a stay." As stated by Mr. Justice Brennan in *Organized Village of Kake v. Egan,* 4 L. Ed. 2d 34, 39 (1959):

> "I recognize that ordinarily a single Justice should exercise great caution in granting a restraining order. I am especially hesitant to grant the relief requested in this case since the District Court refused the relief . . ."

Under the *Magnum* and *Kake* cases, the plaintiff's application for stay should be denied unless the plaintiff can convince this Court that the Banks' fears as to the consequences of the stay are groundless and that there is good ground for the plaintiff's fears as to the impossibility of effective relief after the merger has been effectuated. Plaintiff has advanced nothing to convince the Court on either point except the general arguments as to the difficulty of divestiture which were heard and rejected by the District Court.

4. Argument.

The Stay May Frustrate the Merger, With Adverse Consequences to the Banks and to Competition.

The Department of Justice assumes that the stay will merely preserve the status quo and implies that this cannot harm the Banks. This is not so. Even if the injunction did no more than keep the Banks in status quo—which is not the case—it does not preserve the status quo of their competitors. The competitive position of the two Banks has deteriorated substantially during the fourteen months since their merger was announced. This adverse effect has been more pronounced on Central-Penn (the smaller of the two banks), with the result that Central-Penn has fallen behind Provident and both of them have fallen behind their larger competitors. The affidavit of the Banks' Presidents attached as Exhibit A hereto shows that this tendency will be accentuated if the stay continues.

The statistics included with the Bank Presidents' affidavit show that during the year 1966, while the stay was in effect, the Banks lagged behind their larger competitors in deposits and earnings. The four largest Philadelphia banks' earnings grew nearly ten times as much as Central-Penn's, the two largest Montgomery County banks' earnings grew more than twelve times as much. During a year when Central-Penn's branch system remained unchanged and Provident's increased by only three (counting branches opened and applied for), the four largest Philadelphia banks opened or applied for a total of 32 branches, and the two largest Montgomery County banks opened, acquired or applied for a total of 10.

More serious problems loom in the future. Central-Penn will have four vacancies in its board of directors at the 1967 annual meeting and fourteen at the 1968 meeting. Provident will have five vacancies in 1967 and six in 1968. The caliber of its board of directors is vitally important to

a bank which, like Provident and Central-Penn, does a substantial wholesale business with large customers who give great weight to this factor. It is virtually impossible for the Banks to fill these vacancies with the caliber of person necessary to maintain their competitive position.

The Banks also foresee problems in retaining key personnel and attracting replacements. Since the announcement of the merger, Central-Penn has lost five key men from its small trust department. While four have been replaced, after delay and difficulty, the replacement of further losses may prove impossible. The effects of the stay are manifest in a substantial decline in trust department income.

As shown by the Presidents' affidavit, the Banks do not claim that either of them is in danger of failure. They contend, rather, that if the stay of their merger is continued for another year or two, there is a substantial chance that:

(a) Central-Penn's earnings, assets and branches may continue to lag behind Provident's to such an extent that Central-Penn could no longer expect Provident to go through with the merger; and

(b) Central-Penn might then have to give consideration to the alternative of relinquishing its status as a reserve city bank, converting itself to a state bank, moving its head office out of the City, and resigning from the Federal Reserve System. Even though such a move would mean the loss of most of Central-Penn's wholesale banking business, the competitive pressures inherent in its present status might make the change the lesser of two evils.[4] In such event, the wholesale banking business lost by Central-Penn would doubtless move to the two or three largest banks in Philadelphia, thus increasing their present lead over Provident and the

4. By changing from a reserve city Federal Reserve member bank to a non-member country bank, Central-Penn would reduce its reserve requirements on demand deposits by 27% and would also be permitted to invest 40% of its reserves in interest bearing securities, thus increasing its income by several hundred thousand dollars a year.

other smaller banks. By contrast, permitting the merger would transfer most of this business to Provident and narrow the gap between it and its larger competitors.

The Bank Presidents' affidavit shows that stay will hurt the business of both Banks. It will increase the competitive advantages of the very much larger banks in Philadelphia. It may destroy the merger. And it may force Central-Penn to become a non-member country bank, a change which will not serve the interests of the Department of Justice or the public. In short, the stay will unquestionably hurt the competitive situation in Philadelphia and may hurt it to the point where even an ultimate victory by the Department of Justice would be a Pyrrhic one.

Effective Relief Will Be Available After the Merger.

The Department of Justice does not claim that permitting the merger pending appeal will do permanent injury to banking competition in Philadelphia. There is no contention that the merged bank will have a monopoly in any banking service or will be the largest in any field. There is no charge of predatory practice. The Department's argument is solely that the stay is necessary to preserve the possibility of effective relief if the Department is ultimately successful.

The following section of this memorandum will show that there is, in fact, little chance that the Department will ultimately prevail. In this section it is assumed, for the sake of argument, that the merger is effectuated now—and that eighteen months or two years from now the Court renders a final judgment to the effect that the merger was in violation of the Bank Merger Act. The question then is, what relief will be available?

The Banks do not take issue with the Department as to the futility of any effort at de-merging the Banks two years hence. As shown by their affidavit, the Bank Presi-

dents agree that no one can reconstitute the three essential parts of a bank—its board of directors, its operating personnel, and its customers. However, this does not mean that no effective relief is available—in the factual circumstances involved in this case. The Bank Presidents' affidavit shows that this could be done by a sale of assets.

Central-Penn's business is divided almost evenly between wholesale banking (correspondent banks and large corporations, financial institutions and others in the $100,000 and over class) and retail banking (individuals and smaller local businesses). Wholesale banking is not an issue in this suit. The Department is not concerned with those who do their banking in the national market. The Department's concern is with those who are practically confined to local banking offices, i.e., retail banking.

With respect to retail banking, the Banks will make a strong showing that their branch systems are complementary and not competitive. Assuming, however, that the Department's views prevail and the merger is found to have anticompetitive effects in retail banking, then any relief would be aimed at increasing competition in that field.

Competition in retail banking centers around branch offices, since each office has a service area limited by traveling convenience. A bank's ability to compete in any locality is dependent on the ownership of a branch or branches in that locality. And branches can be sold.[5] Thus the merged bank could affect the retail competition in any locality in the four-county area where it had a branch by selling that branch to a bank not already competing in the locality. The Presidents' affidavit shows that there are, in fact, a number of substantial banks that do not now compete in various localities but might be interested in moving into

5. The proposed final judgment in *United States of America v. Manufacturers Hanover Trust Company,* United States District Court for the Southern District of New York, Civil No. 61 C 3194, which was agreed to by the Department of Justice, would have required the merged bank to sell 46 branches to a bank not disapproved of by plaintiff.

those localities by purchasing branches from the merged bank.[6]

Again in this respect it should be noted that this case is different from *Houston*. Texas is a unit banking state which does not permit branches. Therefore, in *Houston* branch competition is not involved and there are no branches to sell.

There Is Little Chance That Plaintiff Will Prevail.

Plaintiff has based its position in this case on the legal argument that, under the Bank Merger Act of 1966, the Department of Justice is not required to show that the Comptroller acted arbitrarily or abused his discretion when he approved the merger. The District Court, like every other Court which has considered the question,[7] ruled against the plaintiff's contention. It held that under the Bank Merger Act the function of the District Court is to review the Comptroller's decision and that the contrary view advanced by the Department of Justice would violate the Constitutional separation of powers.

Later in this section we will show that the District Court's ruling on the legal question is correct. However, the Banks' position with regard to the final outcome of the case does not depend on the disposition of the legal issue as to the meaning of the Bank Merger Act of 1966.

The Banks confidently expect to win on the legal issue

6. Additionally, it would be possible for the merged bank to sell its very substantial business in financing automobile purchases through local dealers, thus affecting the competitive situation in this field.

7. *United States v. Crocker-Anglo National Bank*, 1966 Trade Reg. Rep. ¶ 71,898 (D. C. Cal.); *United States v. Third National Bank of Nashville*, 1966 Trade Reg. Rep. ¶ 71,934 (M. D. Tenn.). See also, *United States v. First National Bank of Hawaii*, Civ. No. 2540, D. Hawaii, 1966 (oral opinion of October 31, 1966, unreported); *United States v. First City National Bank of Houston*, Civ. No. 66-H-695, S. D. Tex. (oral opinion of December 2, 1966, unreported), Notice of Appeal filed December 21, 1966; *United States v. Mercantile Trust Co.*, 1966 Trade Reg. Rep. ¶———, (E. D. Mo., December 19, 1966).

—in which event the case will be over. But if the legal issue is decided against the Banks and the case is remanded for trial on the basis of the plaintiff's interpretation of the Bank Merger Act, the Banks expect to win on the facts.

This expectation is grounded on the extensive pretrial record in this case, which is contained in the Appendices to this memorandum and outlined above under "History of the Case."

For all practical purposes, this case was pre-tried under the interpretation of the Bank Merger Act now advanced by the Department of Justice. Under Pretrial Order No. 1, plaintiff was free to treat the issues of public interest and convenience and needs according to its view that they are affirmative defenses, to be raised by the Banks. But when the Banks did raise these issues in their pretrial brief, plaintiff made no rebuttal.

Under the final directive of Pretrial Order No. 1, plaintiff has abandoned or withdrawn any contention as to the effects of the merger in meeting community convenience and need, and the Banks' contentions on this issue stand uncontroverted.[8]

Even if Pretrial Order No. 1 is disregarded, it is clear that plaintiff has no case on community convenience and need. The Department of Justice has repeatedly claimed that the Banks are in a better position than the Department to produce evidence on this issue and that the Department should not be required to imagine ways in which a merger might benefit the community. The obvious inference is that when the Banks have produced their evidence, the Department will do likewise. In this case, the Banks' pretrial brief described their evidence on community benefits in thirteen detailed categories. The Department's failure to

8. On November 4 plaintiff was ordered to produce its evidence on convenience and needs, which it declined to do. At the hearing on December 12, the Court reminded the plaintiff that pretrial orders defining the issues are binding on both sides. Counsel for the plaintiff agreed that this was so and again declined to comply with the order of November 4.

reply permits only one conclusion—the Department has no evidence to produce.

The pretrial proceedings show that the most the plaintiff could hope for is to sustain the burden of proof of anticompetitive effects. The Banks will clearly sustain any burden which may be placed upon them as to convenience and needs. However, the ultimate issue in the case is not anticompetitive effects or community convenience and needs; it is whether the merger is in the public interest when these two factors are weighed against one another. The Bank Merger Act permits a merger which would violate the Clayton Act, if such a merger is found to be in the public interest. "The ultimate question [is] whether the merger would be consistent with the public interest despite the foreseeable injury to competition," *Seaboard Airline Railroad Company v. U. S.*, 382 U. S. 154, 156.

Under the plaintiff's view of the law, the District Court would be required to decide this ultimate question of public interest, "independently of the Comptroller and free of presumptions traceable to anyone." But questions of public interest are administrative, not judicial. This was established in *Federal Radio Commission v. General Electric Co.*, 281 U. S. 464 (1930), and *Federal Radio Commission v. Nelson Brothers Bond and Mortgage Co.*, 289 U. S. 266 (1933). The interpretation of the Bank Merger Act urged by the Department of Justice would violate the Constitutional separation of powers. The three-judge District Court so held in the San Francisco bank merger case where Judge Pope said "the problem of reviewing the second determination by the Comptroller, namely, whether the proposed transaction is outweighed in the public interest, and whether it meets the convenience and needs of the community is plainly and unquestionably a legislative or administrative determination of a type which this court, as a constitutional court, is prohibited from deciding." 1966 Trade Reg. Rep. ¶ 71,898, page 83,154. Judge Clary made the same ruling in his December 29 opinion, saying

that "the Government contends that this Court must make an independent decision as to whether the public interest in the merger outweighs any competitive effects. This contention, if considered again, would raise constitutional question of separation of powers."

The District Courts, in rejecting the plaintiff's interpretation of the Bank Merger Act, were following *Philadelphia National*, where this Court said that:

> "A value choice of such magnitude is beyond the ordinary limits of judicial competence . . ." (374 U. S. 371)

In view of the Constitutional mandate, there can be little doubt that the District Court's interpretation of the Bank Merger Act is correct, in which event the case will be over. But even if this Court reverses the District Court on the interpretation of the law, there can be little doubt that the Banks will ultimately prevail on the facts.

5. Procedure on Appeal.

The application for stay proposes an accelerated briefing schedule on appeal so that this case may be argued with the *Houston* case. If the stay is granted, the Banks will accede to the proposed schedule. If the stay is denied and the Banks are permitted to merge, there would be no necessity for acceleration.

6. Conclusion.

It is submitted that in balancing the equities, great weight should be given to the Banks' contentions because they are based on the banking facts and the opinions of experienced bankers set forth in the affidavit of the Banks' Presidents. The Department of Justice, by contrast, has not offered any facts or expert opinions. It relies on naked argument.

It is uncontroverted that the merger will serve the convenience and needs of the Philadelphia community, in-

crease competition with the larger banks, and improve the efficiency of the merged bank and the quality of its banking services. Any anticompetitive effects in retail banking can be remedied by a sale of branches.

Wherefore, it is submitted that the merger should not be stayed longer and the Department's application should be denied.

Respectfully submitted,

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Dated: January 11, 1967.

EXHIBIT A.

IN THE
SUPREME COURT OF THE UNITED STATES.
October Term 1966.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

PROVIDENT NATIONAL BANK AND CENTRAL-PENN NATIONAL BANK OF PHILADELPHIA,
Defendant-Appellees,

AND

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY,
Intervenor-Appellee.

AFFIDAVIT IN SUPPORT OF BANK'S MEMORANDUM OPPOSING APPLICATION FOR STAY.

COUNTY OF PHILADELPHIA
COMMONWEALTH OF PENNSYLVANIA } *ss.:*

WILLIAM G. FOULKE, President of Provident National Bank and prospective Chairman of the merged bank, and HAROLD F. STILL, JR., President of Central-Penn National Bank and prospective President of the merged bank, being duly sworn, depose and say that this affidavit is made in support of the defendant Banks' memorandum opposing the Application for Stay filed by the Department of Justice; and that:

A. *Effects of the Stay Sought by the Department of Justice.*

1. On November 10, 1965, Provident National Bank and Central-Penn National Bank announced their intention to merge. From then until April 1, 1966, the merger was delayed pending approval by the Comptroller of the Currency and the expiration of the 30-day period for filing suit under the Bank Merger Act of 1966. On April 1, 1966 the Department of Justice filed suit to enjoin the merger. Such action resulted in an automatic stay under the Bank Merger Act, which stay has continued until the present. Thus, the Banks have been subjected to a stay of their merger for more than a year, despite the fact that on March 4, 1966, the merger was approved by the Comptroller of the Currency.

2. As will be demonstrated in more detail below, the year of operation under stay has adversely affected the business of both Banks. The adverse effect has been more pronounced in the case of Central-Penn and has aggravated its problems in competing with the larger reserve city banks in Philadelphia. An additional eighteen months of operation under stay will cause further harm to Central-Penn's business, and might affect it to such an extent that the merger terms arrived at in 1965 would no longer be equitable to the Provident stockholders. Thus, it can fairly be said that the stay sought by the Department of Justice might destroy the merger, even if the Banks ultimately prevail in the litigation.

3. We are aware that the purpose of the stay sought by the Department of Justice is to preserve the competitive status quo in case the Department ultimately prevails in the litigation. The results of the past year of operation under the stay show that this is not possible. In that period Provident has lost ground to its larger competitors and Central-Penn has lost considerably more. Continued operation under stay can be expected to accentuate this trend.

The larger banks in the City can be expected to move even further ahead of Provident and Central-Penn, in which event the stay, instead of preserving the competitive status quo, would contribute to its deterioration.

4. During the past year, the directors and officers of the Banks have operated in a state of uncertainty as to whether they would be permitted to merge or would be required to continue as separate institutions. This has necessitated postponement of decisions and commitments and has retarded the development of the Banks. Specifically:

(a) Both Banks have avoided substantial commitments to change procedures, acquire equipment, or hire personnel which would be duplicative after the merger. As a result, they have lost the momentum and aggressiveness necessary for growth and development.

(b) Central-Penn has deferred for the duration of the litigation the raising of additional capital, which was under active consideration when the merger was announced and would doubtless have been effected by now if the money market had permitted.

(c) While continuing to computerize its operations and develop new electronic data processing services, Central-Penn has postponed the major effort which it would have to make in this field. The reasons for the postponement are: first, the possibility that new equipment and programs will become duplicative after the merger; and second, the problems involved in the commitment of necessary capital and personnel. With bank profit margins narrowing, it is essential to computerize as many operations as possible. Central-Penn has been slow in this regard and must make the necessary decisions in the very near future.

(d) Central-Penn has filed no applications for additional branches to fill the serious gaps in its pres-

ent branch system, the reasons being its desire to avoid a further drain on earnings and perhaps capital and the uncertainty as to whether the gaps would be filled by the merger with Provident. Provident opened two new branches in 1966 and has an application for a third branch approved and awaiting zoning action. This branching activity on the part of Provident was less than that of the larger banks. At the same time, it was more than Central-Penn's and thus widened the gap between the Provident and Central-Penn branch systems, which in turn may ultimately affect the fairness of the merger terms.

(e) Central-Penn has taken no steps to enlarge its international department, since this need will be largely filled by the merger.

(f) Both Banks have put aside any consideration of mergers with any of the numerous small banks in the area, even where such mergers would seem to have no anticompetitive effect. In the meanwhile, one substantial competitor has been permitted to acquire three offices and nearly $30 million of resources by merger.

5. The uncertainty has hindered the Banks in retaining and attracting personnel. Since the announcement of the merger, Central-Penn has lost three of the ten officers and two other key personnel in its trust department including the department head, the only experienced tax man and the only two estate planners. While all but one have been replaced, the difficulty and delay in finding replacements adversely affected trust business. Gross income from this business was substantially lower in 1966 than in 1965. The situation is still unsettled, and the difficulty experienced in recruiting replacements shows that any future vacancies in this department or in any other department will be almost impossible to fill with qualified personnel. The difficulty in recruiting personnel above the junior officer level extends to other departments in

both Banks. Candidates cannot be expected to take a position with an employer who cannot predict how long the position will last or what will become of its occupant when it is ended. Thus the Banks are virtually precluded from obtaining new top officers to initiate new services or operations.

6. The Banks are experiencing similar problems in obtaining directors. There are at present three vacancies on the Central-Penn board and one vacancy on the Provident board. Central-Penn will have a fourth vacancy and Provident five vacancies at their 1967 annual meetings. Central-Penn is scheduled to replace ten directors at the 1968 annual meeting and Provident one. It is very difficult for either Bank, particularly Central-Penn, to recruit replacements when the Bank cannot tell the prospective director how long he will serve or whether he will serve with a merged or a separate institution. The strength of its board of directors is vitally important to a bank, particularly one which, like Provident or Central-Penn, does a substantial wholesale business. The larger corporate and financial customers give great weight to this factor in choosing banking connections. The growing number of vacancies in the Banks' boards will handicap them in their efforts to attract new customers of this kind. Because of the larger number of vacancies among its directors, Central-Penn can be expected to experience greater difficulty in this regard, and this, too, may ultimately threaten the fairness of the merger terms.

7. The combination of factors described in the preceding paragraphs has forced the Banks (and particularly Central-Penn) to "mark time" until the merger is completed. During the tight money market which prevailed in 1966, it was possible for the Banks to do this without substantial ill effect except a decline in their deposits and earnings as compared with their larger competitors. At

such time as the money market eases, the adverse effect of marking time will become more pronounced and the competitive position of the Banks will deteriorate.

8. The problem of inadequate space for Central-Penn's operating departments—which would be solved by the merger—became so pressing during 1966 that, after months of delay, a decision was made to rent additional space and proceed with costly renovations. These expenditures may well prove wasteful if the merger is consummated and, at the same time, do not represent the best solution if the merger is enjoined.

9. The overall effect of the factors described above is reflected in the adverse results of the Banks' operations during the past 12 months as compared with their competitors. Specifically:

(a) Both Banks' deposit growth was small in comparison with their competitors. For the year 1966, Central-Penn's growth in deposits was the lowest and Provident's the second lowest of the six reserve city banks in Philadelphia. Their combined growth was less than one-half the average for the four other city banks and less than one-third of the average for the two large Montgomery County banks (See Schedule A).

(b) Both Banks lagged in earnings. Central-Penn's net operating earnings after taxes for 1966 exceeded the corresponding figure for 1965 by 1.2%, whereas the average improvement in earnings for the four leading banks in Philadelphia was 11.9% and for the two leading banks in Montgomery County was 15.9%. Provident's earnings increased substantially more than Central-Penn's, but less than the average, another indication that the merger terms cannot be maintained indefinitely (See Schedule A).

(c) Both Banks lagged behind their competitors in branching. Provident opened two branches and

applied for a third, and Central-Penn's branch system remained unchanged; whereas their principal competitors have expanded or are in the process of expanding their systems to a very substantial degree by branching and merger (See Schedule B).

(d) Stock prices for both Banks were lower than for their competitors, whether measured in relation to book value or earnings (See Schedule C).

(e) The correspondent bank balances of both Banks have declined, while at the same time the balances of Philadelphia National Bank, the leader in the City, have increased. In national ranking, Provident has fallen from 67th place to 85th place and Central-Penn has fallen from 123rd place to 145th place (See Schedule D).

In summary, the period of litigation to date has proved burdensome to both Banks. While other large banks in the City have moved forward with such new developments as credit cards, it has been virtually impossible for the defendant Banks to make any decisions with long range implications. Future planning, an essential to any well run bank, has been neglected because of the uncertainty surrounding the situation, and because of the demands of the merger litigation on the time and energies of top management.

10. We have considered what may happen if the present state of uncertainty continues for another eighteen months or more. In our opinion, as indicated above, there is a very real possibility that the business of the two Banks may change so drastically in relation to each other that the merger terms will no longer be fair and equitable and the merger will fail. Such a failure must be considered permanent. Experience has shown that it is virtually impossible to renegotiate the terms of a merger between sub-

stantial corporations once the merger has been frustrated for any reason.

11. If the merger fails, Central-Penn might have to give consideration to the alternative of relinquishing its status as a reserve city bank, converting itself to a state bank, moving its headquarters outside Philadelphia (probably to Montgomery County), and resigning from the Federal Reserve System. Even though such a move would mean the loss of much of Central-Penn's wholesale business, it would have compensating features in that (a) as a country bank, Central-Penn would be required to maintain only 12% reserves against demand deposits, as compared with the 16½% reserves required of reserve city banks; and (b) as a non-member bank, Central-Penn could invest 40% of its reserves in interest bearing securities, whereas a member bank must maintain its reserves with the Federal Reserve System, where they produce no income. These changes would mean substantially more income from any given level of deposits. In addition, as a Montgomery County bank, Central-Penn could branch into three additional counties as well as the four counties where it is permitted to branch today.

12. If Central-Penn were to relinuqish its status as a reserve city bank, a very large part of its wholesale banking business (business with correspondent banks, large corporations, financial institutions and others in the national market) could be expected to move to the very largest banks in Philadelphia rather than to Provident (the fifth largest bank), as would be the case if the merger is permitted. Thus Central-Penn's election to change its status would tend to increase the concentration of wholesale business in Philadelphia among the top two or three institutions. Moreover, the removal of a substantial bank from the City and from the Federal Reserve System could be expected to have an adverse effect on the Philadelphia financial community and the City's economy.

B. *Availability of Relief If Department of Justice Prevails.*

13. We understand that the Department of Justice has argued that, if the Banks are permitted to merge at this time and the Department ultimately prevails in the litigation, no effective relief will be available to the Department. We further understand that, in order to be effective, any relief would have to give promise of compensating for the elimination of Central-Penn as a separate institution. The following paragraphs of this affidavit will demonstrate that, insofar as it is possible to foresee conditions two or more years hence, relief will be available by way of sale of assets.

14. We concur in the view, which we understand has been advanced by the Department of Justice; namely, that after the merger has been effectuated it will not be possible to recreate Central-Penn. Specifically, no one could reconstitute the Central-Penn board of directors, personnel, depositors, and trust business. While in theory it might be possible to create a new bank of approximately the size of the present Central-Penn, the practical difficulties of obtaining directors, personnel and customers for such a new bank make this possibility a remote one. In short, we recognize that the merger will eliminate one corporate entity, but we do not believe that there need be any corresponding lessening in competition. On the contrary, to the best of our knowledge, leading bankers are unanimous in believing that the merger will stimulate competition among the larger banks in the four-county area.

15. An obvious way to restore any competition that may be lost through the merger of Provident and Central-Penn (assuming that the merger is ultimately held to be illegal) is for the merged bank to sell assets to one or more of the remaining banks which are now competing or can potentially compete in the Philadelphia four-county area. For example:

(a) There are large banks in Montgomery County which have virtually no branches in Bucks County. If the merged bank were to sell some of its Bucks County branches to one of them, a new competitive force would be created in that county.

(b) There is one substantial bank in Delaware County which might well consider expanding into Montgomery or Philadelphia Counties by purchasing branches from the merged bank.

(c) There is a substantial bank with branches confined to a portion of Philadelphia County which might be interested in expanding further by purchasing branches.

(d) There is a very substantial bank in Berks County which has just acquired a Montgomery County branch and might be interested in acquiring more, or even in moving its headquarters to Montgomery County.

(e) A finance company or a bank not now active in local automobile dealer paper could enter that field as a substantial competitive force by purchasing the appropriate assets of the consumer finance division of the merged bank.

Any such divestiture could be protected by covenants preventing the merged bank from competing with the divested business or from acquiring an equivalent business through merger or purchase.

16. In suggesting the divestiture possibilities outlined in paragraph 15, we have assumed that a sale of a branch would include transfer of the physical assets (owned or leased), together with the list of depositors using the branch and the loans of local customers. The divesting bank might

further agree not to solicit depositors of the branch for a reasonable period. We also believe that the local automobile dealer business can be transferred as a going concern.

17. In suggesting the divestiture possibilities described in paragraph 15, we have taken into consideration the fact that not all the potential purchasers would be able to finance the purchase from existing resources. While it is not possible to foresee the state of the money market a year or two hence, it should be noted that the purchaser will be acquiring established assets with a history of successful operations. It is reasonable to expect that financing would be available to acquire such assets if the price were attractive in relation to actual and potential earnings.

18. No contention has been made that there will be any adverse competitive effects from the merger of Central-Penn's trust department (with trust assets of less than $200 million) into Provident's trust department (with trust assets over $2 billion). However, to avoid misunderstanding, we point out that trust assets cannot be considered subject to divestiture. The reasons are (a) the beneficiaries of the trust and the Orphans Court may not approve the transfer, which would inevitably be from a larger to a smaller trust department; (b) accounting, guardian ad litem and other fees would impose a substantial cost on the transfer; and (c) there could be no assurance that trust department personnel would move to the transferee bank. Similarly, we point out that it is not practicable to transfer the business of substantial corporate and financial customers, who have a wide range of choice of banking connections in Philadelphia and elsewhere.

This affidavit is based upon the experience and knowledge of each of the undersigned as to the Bank of which he is President, supplemented by consultation with personnel

at Provident and Central-Penn, and the facts stated herein are correct to the best of the knowledge, information and belief of the undersigned.

WILLIAM G. FOULKE,
William G. Foulke,

HAROLD F. STILL, JR.,
Harold F. Still, Jr.

Sworn to and subscribed before me this 10th day of January, 1967.

MARION K. CHARLES,
Notary Public, Philadelphia, Phila. Co.,
My Commission Expires November 6, 1967.

SCHEDULE A

Leading Philadelphia Commercial Banks
Comparisons of Growth in Deposits and Earnings
(000 omitted)

	Total Deposits			Net Operating Earnings After Federal Income Taxes		
Reserve City Banks	*12/31/66*	*12/31/65*	*Increase*	*1966*	*1965*	*Increase*
First Pennsylvania	$1,577,843	$1,458,500	8.2%	$15,109	$13,453	12.3%
Philadelphia National	1,457,081	1,292,155	12.8	12,876	11,692	10.1
Girard Trust	1,140,452	1,013,350	12.5	12,031	10,918	10.2
Fidelity Philadelphia	872,137	790,743	10.3	9,404	8,084	16.3
Average of Four Banks named above			10.8			11.9
Provident National	662,448	627,125	5.6	7,818	7,397	5.7
Central Penn National	346,678	332,977	4.1	2,891	2,857	1.2
Provident and Central Penn Combined	1,009,126	960,102	5.1	10,709	10,254	4.4
Montgomery County Banks						
Continental	383,539	328,469	16.8	4,525	3,924	15.3
Industrial Valley	225,536	195,445	15.4	2,020	1,733	16.6

Based on Comparative Statements of Philadelphia Banks—The Philadelphia Inquirer, January 9, 1967

SCHEDULE B

Comparison of Branching Activity
For Selected Philadelphia Banks
For Period January 1 Through December 21, 1966.

	Provident National Bank	*Central Penn N. B.*	*Fidelity Phila. Trust*	*First Penna.*	*Girard Trust*	*Phila. Nat'l Bank*	*I V B*	*Continental Bank*
Offices as of 12/31/65	31	24	47	47	49	38	23	37
Offices opened in 1966	2	0	3	5	2	0	1	2
Offices obtained by merger 1966	0	0	0	0	0	0	3	0
Applications for new offices approved but not opened	1	0	4	3	7	3	4	0
Application filed awaiting decision	0	0	3	1	0	1	0	0
Total	34	24	57	56	58	42	31	39

SCHEDULE C

Comparison of Stock Prices for Selected Philadelphia Banks As of September 30, 1966

Price Times Earnings (12 Months Ended 9/30/66)

1. Provident National Bank	9.6
2. Central-Penn National Bank	9.8
3. The First Pennsylvania Banking & Trust Co.	10.1
4. The Philadelphia National Bank	10.1
5. Girard Trust Bank	10.3
6. Fidelity-Philadelphia Trust Co.	10.5
7. Continental Bank and Trust Co.	11.8
8. Frankford Trust Co.	13.3
9. Industrial Valley Bank and Trust Co.	N.R.

Average 8 Banks—10.7

Price as % of Book Value

1. Central-Penn National Bank	86.8%
2. Provident National Bank	91.8%
3. The Philadelphia National Bank	97.6%
4. The First Pennsylvania Banking & Trust Co.	99.3%
5. Girard Trust Bank	110.8%
6. Fidelity-Philadelphia Trust Co.	117.1%
7. Continental Bank and Trust Co.	123.4%
8. Industrial Valley Bank and Trust Co.	147.1%
9. Frankford Trust Co.	197.6%

Average 9 Banks—119.06%

Source: Stroud Report

SCHEDULE D

Comparison of Correspondent Bank Deposits of Pennsylvania Banks With Such Deposits Over $500,000
(000 omitted)

	Sept. 20 or Sept. 30, 1966								Sept. 30 or Oct. 13, 1965				
	Due to Banks			Total Deposits	D. to B. to T'tl Dep.	No. Corresp. Banks			Due to Banks			Total Deps.	D. to B. to T'tl Dep.
	Total $	Dom. $	Fgn. $	$	%	Total	Dom.	Fgn.	Total $	Dom. $	Fgn. $	$	%
Pennsylvania													
Philadelphia National Bank	226,052	199,551	26,501	1,350,321	16.7	....	....	....	219,487	195,837	23,650	1,227,426	17.8
1st Pennsylvania Bkg. & T. Co., Phila.	196,388	188,061	8,327	1,389,042	14.1	....	....	....	209,331	203,351	5,980	1,345,982	15.5
Girard Trust Bank, Philadelphia	81,216	76,594	4,622	1,055,076	7.7	452	302	150	86,824	81,345	5,479	955,766	9.1
Provident National Bank, Philadelphia	42,396	40,375	2,021	636,956	6.7	327	261	66	55,246	53,104	2,142	616,742	8.9
Fidelity Philadelphia Trust Co.	40,031	34,306	5,724	837,994	4.8	359	223	136	49,748	44,756	4,992	758,152	6.5
Central-Penn Nat'l Bk., Philadelphia	18,247	18,017	230	332,977	5.4	....	....	....	25,744	25,504	240	327,070	7.7
Northeastern Pa. NB&T Co., Scranton	7,452	7,446	6	199,802	3.7	49	48	1	7,753	7,749	5	187,539	4.1
First National Bank, Wilkes-Barre	7,377	7,377	....	96,020	7.7	53	....	....	7,982	7,982	....	87,728	9.1
Industrial Valley B&T Co., Jenkintown	1,720	1,720	....	192,933	0.9	21	21	....	8,239	8,239	....	194,840	4.2
Third National B&T Co., Scranton	695	695	....	58,124	1.2	10	10	....	445	445	....	53,642	0.8
Miners National Bank, Wilkes-Barre	558	558	....	122,762	0.5	3	3	....	....	....	....	....	...

Source: The "American Banker," 1966 Correspondent Bank Survey

SUPREME COURT OF THE UNITED STATES

Nos. 914 and 972.—October Term, 1966.

United States, Appellant, 914 *v.* First City National Bank of Houston et al.	On Appeal From the United States District Court for the Southern District of Texas.
United States, Appellant, 972 *v.* Provident National Bank et al.	On Appeal From the United States District Court for The Eastern District of Pennsylvania.

[March 27, 1967.]

Mr. Justice Douglas delivered the opinion of the Court.

These civil suits were filed by the United States under § 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U. S. C. § 18, to prevent two bank mergers—one in Texas between the First City National Bank of Houston and the Southern National Bank of Houston, and one in Pennsylvania between the Provident National Bank and the Central Penn National Bank, both in Philadelphia.

The Comptroller approved the mergers under the Bank Merger Act of 1966, 80 Stat. 7, 12 U. S. C. § 1828 (c). The United States thereupon brought these suits in the respective District Courts and the Comptroller intervened in them. The District Courts dismissed the complaints. — F. Supp. —; 262 F. Supp. 397. The United States appealed, 32 Stat. 823, as amended, 15 U. S. C. § 29, and we noted probable jurisdiction, — U. S. —, — U. S. —.

I.

It is suggested that the complaints are defective in that they fail to state that the actions are brought under the Bank Merger Act of 1966, do not even mention

the Act, and that, therefore, these cases should be remanded to allow the Government to amend the complaints.

The Bank Merger Act of 1966 provides that "any action brought under the *antitrust laws*" shall be brought within a specified time (12 U. S. C. § 1828 (c)(7)(A)); it also specifies the standards to be applied by a court in a judicial proceeding challenging a bank merger "on the ground that the merger . . . constituted a violation of any *antitrust laws* other than section 2 of [the Sherman Act]" (12 U. S. C. § 1828 (c)(7)(B)); and it provides immunity from such an attack if those standards are met. Section 1828 (c)(8) provides that, "for the purposes of [§ 1828 (c)], the term 'antitrust laws' means . . . [the Sherman Act], . . . [the Clayton Act], and any other Acts in pari materia." Thus, an action challenging a bank merger on the ground of its anticompetitive effects is brought under the antitrust laws. Once an action is brought under the antitrust laws, the Bank Merger Act provides a new defense or justification to the merger's proponents—"that the anticompetitive effects of the proposed merger are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." 12 U. S. C. § 1828 (c)(5)(B). There is no indication that an action challenging a merger on the ground of its anticompetitive effects is bottomed on the Bank Merger Act rather than on the antitrust laws. What is apparent is that Congress intended that a defense or justification be available once it had been determined that a transaction would have anticompetitive effects, as judged by the standards normally applied in antitrust actions. Thus, the Government's failure to base the actions on the Bank Merger Act of 1966 does not constitute a defect in its pleadings. Nor is the Government's failure to mention the Bank Merger Act fatal, for, as we shall see,

the offsetting community "convenience and needs," as specified in 12 U. S. C. § 1828 (c)(5)(B), must be pleaded and proved by the defenders of the merger.

II.

An application for approval of the Texas merger was made to the Comptroller of the Currency pursuant to 12 U. S. C. § 1828 (c)(5)(B), which provides that he shall not approve the merger "whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless [he] finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." Requests were made of the Attorney General and the Federal Reserve System pursuant to 12 U. S. C. § 1828 (c)(4) for their views and both submitted reports to the Comptroller that the merger would have serious anticompetitive effects. The Comptroller nonetheless approved it.

The same procedure was followed in the Pennsylvania case, and the Attorney General and Federal Reserve submitted adverse reports. Nonetheless the Comptroller approved this merger also. And, as we have said, these civil suits were instituted to enjoin them under § 7 of the Clayton Act.

Section 7 of the Clayton Act condemns mergers where "the effect of such acquisition may be substantially to lessen competition." The Bank Merger Act of 1966 did not change that standard. It, however, added innovations, not only in machinery for obtaining the prior approval of the Comptroller and a preliminary expression of views by the Attorney General and the Federal Reserve but also an additional standard for the Comptroller. Section 1828 (c)(5)(B) says, as already noted, that no

merger shall be approved where the effect "may be substantially to lessen competition" unless the responsible agency, in this case the Comptroller, "finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." And that subsection goes on to say: "In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served."

Section 1828 (c)(7)(B) provides that in a judicial proceeding attacking a merger on the ground that it violates the antitrust laws "the standards applied by the court shall be identical with" those the banking agencies must apply. And 12 U. S. C. § 1827 (c)(7)(A) states that "In any such action, the court shall review *de novo* the issues presented." (Emphasis added.)

Section 1828 (c)(7)(A) also provides that the commencement of an antitrust action in the courts "shall stay the effectiveness of the agency's approval unless the court shall otherwise specifically order."

It is around these new provisions of the 1966 Act and their interplay with § 7 of the Clayton Act that the present controversy turns.

First is the question whether the burden of proof is on the defendant banks to establish that an anticompetitive merger is within the exception of 12 U. S. C. § 1828 (c)(5)(B) or whether it is on the Government. We think it plain that the banks carry the burden. That is the general rule where one claims the benefits of an exception to the prohibition of a statute. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 44–45. The House Report (No. 1221, 89th Cong., 2d Sess.) makes clear that antitrust standards were the norm and

anticompetitive bank mergers, the exception: ". . . the bill acknowledges that the general principle of the antitrust laws—that substantially anticompetitive mergers are prohibited—applies to banks, but permits an *exception* in cases where it is clearly shown that a given merger is so beneficial to the convenience and needs of the community to be served . . . that it would be in the public interest to permit." (Emphasis added.) *Id.*, at 3-4.

The sponsor of the bill that was finally enacted, Congressman Patman, flatly stated: "It should be clearly noted that the burden of establishing such 'convenience and needs' is on the banks seeking to merge; and when we say clearly outweighed we mean outweighed by the preponderance of the evidence." 112 Cong. Rec. (daily ed.) 2333-2334.

We therefore disagree with the views of the lower courts to the contrary.

This problem is, of course, subtly merged with the question whether judicial review of the Comptroller's decision is in the category of other administrative rulings which are sustained unless a court is persuaded that the agency's action is clearly unsupported or not supported by substantial evidence, and the like.

The 1966 Act was the product of powerful contending forces, each of which in the aftermath claimed more of a victory than it deserved, leaving the controversy that finally abated in Congress to be finally resolved in the courts. So far as review of administrative agency action is concerned, we have only this to say. Prior to the 1966 Act administrative approval of bank mergers was necessary. Yet in an antitrust action later brought to enjoin them we never stopped to consider what weight, if any, the agency's determination should have in the antitrust case. See *United States* v. *Philadelphia National Bank*, 374 U. S. 321; *United States* v. *First National Bk. & Tr.*

Co., 376 U. S. 665. Traditionally in antitrust actions involving regulated industries, the courts have never given presumptive weight to a prior agency decision, for the simple reason that Congress put such suits on a different axis than was familiar in administrative procedure. *United States* v. *Radio Corporation of America*, 358 U. S. 334; *United States* v. *El Paso Natural Gas Co.*, 376 U. S. 651; *United States* v. *Philadelphia National Bank, supra; United States* v. *First National Bk. & Tr. Co., supra.* We have found no indication that Congress designed judicial review differently under the 1966 Act than had earlier obtained.

In fact, as already noted, "the standards applied by the court shall be identical with those that the banking agencies are directed to apply." 12 U. S. C. § 1828 (c)(7)(B). This language does not express the conventional standard, *e. g.*, whether the agency's action is supported by substantial evidence. In the latter instance it is the agency's function to determine whether the law has been violated, while it is the court's function to ascertain whether, absent error in statutory construction, the agency's action has substantial support in the evidence. There is no indication that Congress took that course here. Indeed the 1966 Act provides that the court in an antitrust action "shall review *de novo* the issues presented." 12 U. S. C. § 1828 (c)(7)(A). It is argued that the use of the word "review" rather than "trial" indicates a more limited scope to judicial action. The words "review" and "trial" might conceivably be used interchangeably. The critical words seem to us to be "*de novo*" and "issues presented." They mean to us that the court should make an independent determination of the issues. Congressman Patman, the Chairman of the House Committee that drafted the Act, in speaking of this *de novo* review said that the court would

"completely and on its own make a determination as to whether the challenged bank merger should be approved under the standard set forth in paragraph 5 (B) of the bill." He added that the "court is not to give any special weight to the determination of the bank supervisory agency on this issue.". 112 Cong. Rec. (daily ed.) 2335. Indeed the momentum of judicial precedents is in that direction. For immunity from antitrust laws "is not lightly implied." *California* v. *Federal Power Commission*, 369 U. S. 482, 485. And the grant of administrative power to give immunity unless the agency's decision is arbitrary, capricious, or unsupported by substantial evidence, would be a long step in that direction. Moreover, the Comptroller's action is informal, no hearings in the customary sense being held prior to the 1966 Act (*United States* v. *Philadelphia National Bank, supra*, at 351) and none being required by Congress in the 1966 Act. We would therefore have to assume that Congress made a revolutionary innovation by making administrative action well nigh conclusive, even though no hearing had been held and no record in the customary sense created.

The courts may find the Comptroller's reasons persuasive or well nigh conclusive. But it is the court's judgment, not the Comptroller's, that finally determines whether the merger is legal. That was the practice prior to the 1966 Act; and we cannot find a purpose on the part of Congress to change the rule. This conclusion does not raise serious constitutional questions by making the courts perform nonjudicial tasks. The "rule of reason," long prevalent in the antitrust field (see, *e. g.*, *Chicago Board of Trade* v. *United States*, 246 U. S. 231) has been administered by the courts. A determination of the effect on competition within the meaning of § 7 of the Clayton Act is a familiar judicial task. The area of "the

convenience and needs of the community to be served," now in focus as part of the defense under the 1966 Act, is related, though perhaps remotely, to the failing-company doctrine, long known to the courts in antitrust merger cases. *United States* v. *Diebold, Inc.*, 369 U. S. 654. The appraisal of competitive factors is grist for the antitrust mill. See, *e. g., United States* v. *Philadelphia National Bank, supra*, 357–367. The courts are not left at large as planning agencies. The effect on competition is the standard; and it is a familiar one.[1] If the anticompetitive effect is adverse, then it is to be excused only if "the convenience and needs of the community to be served" *clearly* outweigh it. We see no problems in bringing these standards into the area of judicial competence. There are no constitutional problems here not present in the "rule of reason" cases.

There is left only the stay issue. As we have seen, the 1966 Act provides that a timely antitrust action "shall stay the effectiveness of the agency's approval unless the court shall otherwise specifically order." 12 U. S. C. § 1828 (c)(7)(A). The lower courts dissolved the statutory stays on dismissing the antitrust suits.

Our remand will direct that the stays continue until the hearings below are completed and any appeal is had.

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[1] 12 U. S. C. § 1828 (c)(5)(B)(5) provides, as we have seen, that a merger shall not be approved "whose effect in any section of the country may be substantially to lessen competition." It is pointed out that that standard omits the phrase "in any line of commerce" which is present in § 7 of the Clayton Act. It is argued that Congress meant that commercial banking is no longer to be considered as the area of effective competition and that the Act establishes in banking "a market test measurable only by larger commercial realities."

We do not reach this question and we intimate no opinion on it nor any views on the merits of these mergers or on the justifications that are urged in their support. All questions except the procedural ones treated in the opinion are reserved.

A stay of course is not mandatory under any and all circumstances. But absent a frivolous complaint by the United States, which we presume will be infrequent, a stay is essential until the judicial remedies have been exhausted. The caption of the 1966 Act states that it is designed "to establish a procedure for the review of proposed bank mergers so as to eliminate the necessity for the dissolution of merged banks." Moreover, bank mergers may not, absent emergency conditions, be consummated until 30 days after approval by the Comptroller in order to enable the Attorney General to commence an antitrust action, 12 U. S. C. § 1828 (c)(6), which, apart from emergency situations, must be started within 30 days of the agency's approval, 12 U. S. C. § 1828 (c)(7)(A). The legislative history is replete with references to the difficulty of unscrambling two or more banks *after* their merger.[2] The normal procedure therefore should be maintenance of the *status quo* until the

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[2] The Chairman of the Federal Reserve System testified in the hearings that preceded enactment of the Bank Merger Act of 1966 that "[a] Federal court order cannot recreate the two banks that formerly existed. . . . No matter how one may feel about whether the merger should have taken place in the first instance, there is no turning back. To unscramble the resulting bank clearly poses serious problems not only for the banks but for its customers and for the community." Hearings on S. 1698 and related bills before the Subcommittee on Domestic Finance of the House Committee on Banking and Currency, 89th Cong., 1st Sess., 11. The president of the American Bankers Association declared that "'unmerging' a bank after the two banks have operated as a single unit is nightmarish even in the abstract." Hearings on S. 1698 before a Subcommittee of the Senate Committee on Banking and Currency, 89th Cong., 1st Sess., 63. Senator Robertson stated, "[y]ou are dealing with a physical impossibility," and "the community gets hurt," when divestiture is attempted in a bank merger case. *Id.*, at 4. Senator Proxmire spoke of "the agony and the inequity and the financial loss, disruption of the economy in the community of being required . . . to unscramble." *Id.*, at 202.

antitrust litigation has run its course, lest consummation take place and the unscrambling process that Congress abhorred *in the case of banks* be necessary.

Reversed.

MR. JUSTICE CLARK took no part in the consideration or decision of these cases.